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### Aesthetics of Commercial Law: Domestic and International Implications

Heather Hughes

American University Washington College of Law, [hhughes@wcl.american.edu](mailto:hhughes@wcl.american.edu)

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# Louisiana Law Review



Aesthetics of Commercial Law—Domestic and  
International Implications

*Heather Hughes*

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# Aesthetics of Commercial Law—Domestic and International Implications

*Heather Hughes\**

## TABLE OF CONTENTS

Introduction.....	690
I. Aesthetics and Law .....	695
II. Aesthetics of Commercial Law.....	706
A. The Energy Aesthetic.....	706
B. The Grid Aesthetic .....	716
C. The Instrumentalist Aesthetic .....	723
III. The Sublime and the UCC .....	729
IV. Consequences of Aesthetics of Commercial Law.....	735
A. Common Refrains Against Reform.....	735
B. The Export of U.S. Commercial Law Models .....	737
1. One Theory of Imperial Law .....	740
2. Resisting Imperial Dualism.....	745
Conclusion.....	749

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\* Assistant Professor, Florida International University College of Law; J.D. *cum laude*, Harvard Law School; B.A. University of Chicago. I thank Jean Braucher, Pierre Schlag, Jorge Esquirol, David Carlson, Ediberto Román, Hannibal Travis, José Gabilondo, Ugo Mattei, Daniel Farnbach, and the faculties at FIU College of Law; American University, Washington College of Law; and University of San Francisco Law School for many thoughtful comments, and Brooke Terpening for excellent research assistance.

*Judged by its reception in the enacting legislatures, the [Uniform Commercial] Code is the most spectacular success story in the history of American law.*

—James J. White & Robert S. Summers<sup>1</sup>

*[W]hat becomes global is not so much the . . . nitty-gritty American law, but rather its spectacular aspects. It is not efficiency but the spectacle of efficiency . . . .*

—Ugo Mattei<sup>2</sup>

## INTRODUCTION

Rationality cannot explain current levels of commercial activity and forms of commercial law. How can continuously expanding access to credit be efficient when staggering environmental costs of over-development seem obvious?<sup>3</sup> A turn to aesthetics directs attention to the non-rational, pre-reflective elements at play in commercial law. It is crucial to consider these

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1. James J. White & Robert S. Summers, *UNIFORM COMMERCIAL CODE* 4 (5th ed. 2000).

2. Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEG. STUD.* 383, 438 (2003).

3. See generally Dolores Hayden, *A FIELD GUIDE TO SPRAWL* (2004), and discussion *infra* Part III. This article does not employ law and economics methodologies. The term “rationality” in this context means that the current law just does not make sense because it facilitates, and does nothing to check, over-development. It is inefficient in the (Kaldor-Hicks) sense that if a cost-benefit analysis that internalizes social costs could be done, it would find enormous costs that must outweigh the benefits of encouraging ever-escalating levels of commercial activity. Whether or not a given policy is efficient is not a knowable fact in the world because we can never definitively know and quantify all externalities. Some say that the concept of efficiency itself only makes sense in the context of a particular exchange (that is presumably efficient), and, beyond that, “efficiency” is a term without practical relevance. See, e.g., David Gray Carlson, *On the Efficiency of Secured Lending*, 80 *VA. L. REV.* 2179 (1994). But the fact that total externalities are unknowable does not defeat an argument that certain laws are so costly that they should be carefully re-examined. The concept of efficiency has a history and usage in legal argumentation and scholarship that often departs from parameters of the field of economics. This is not to say, of course, that parameters of economic modeling exclude, necessarily, consideration of social costs. Cf. Reza Dibadj, *Weasel Numbers*, 27 *CARDOZO L. REV.* 1325 (2006) (discussing the necessity for welfare economics of dealing with “weasel numbers,” or numbers that encompass value judgments, in providing useful input for policymakers).



suppressed elements as legal professionals applaud U.S. commercial law's facilitation of commercial activity here and superiority for attracting investment abroad.<sup>4</sup>

Aesthetics<sup>5</sup> affect<sup>6</sup> legal actors' expectations and uses of commercial law.<sup>7</sup> Certain aesthetics of commercial law in the

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4. See discussion *infra* note 137, and Part IV.B.

5. The field of aesthetics, generally, is the philosophy of art and beauty. However, the study of aesthetics has evolved to include analysis of the full range of sensory input that we encounter and that shapes our preferences, values, and reactions. It includes analysis of wide-ranging subjects; its concerns are not limited to art or explicitly artistic endeavors. See, e.g., F.R. Ankersmit, *AESTHETIC POLITICS: POLITICAL PHILOSOPHY BEYOND FACT AND VALUE* (1996); John Dewey, *ARTS AS EXPERIENCE* (1934) (finding that the aesthetic applies to everyday experience and not just art); Terry Eagleton, *THE IDEOLOGY OF THE AESTHETIC* (1990) (espousing a view of art as ideology); Joseph H. Kupfer, *EXPERIENCE AS ART: AESTHETICS IN EVERYDAY LIFE* (1983) (including sports in everyday aesthetics); Andrew Light & Jonathan M. Smith, *THE AESTHETICS OF EVERYDAY LIFE* ix (2005) (recognizing "a new arena of aesthetic inquiry—the broader world itself"); Richard Shustern, *Somaesthetics: A Disciplinary Proposal*, 57 *J. AESTHETICS & ART CRITICISM* 299 (1999) (discussing Alexander Baumgarten, *AESTHETICA* (1750), which proposes an aesthetic of wide-ranging practical importance, encompassing much more than fine art and natural beauty).

6. "Aesthetics" in plural form normally takes a singular verb, as in: "Aesthetics is a branch of philosophy." This article uses the plural verb form because it is referring to specific aesthetics—grid aesthetic, energy aesthetic, instrumentalist aesthetic—collectively. Also, this article employs a subjectivist aesthetic in its understanding of the aesthetics of commercial law. On this issue of reflexivity, see discussion *infra* note 49 and accompanying text. Within a subjectivist aesthetic, "aesthetics" has properties of a subject, such as a will. Certain aesthetics of commercial law shape, limit, affect, etc., possibilities for this law.

7. See *supra* notes 5–6 and *infra* Part I for discussion of how this work uses aesthetics. In recent decades numerous scholars have written, with varying approaches and purposes, about the aesthetics of law. See, e.g., Costas Douzinas & Ronnie Warrington, *JUSTICE MISCARRIED: ETHICS, AESTHETICS AND THE LAW* (1994); Adam Gearey, *LAW AND AESTHETICS* (2001); *LAW AND AESTHETICS* (Roberta Kevelson ed., 1992); *LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* (Costas Douzinas & Lynda Nead eds., 1999) [hereinafter *LAW AND THE IMAGE*]; Desmond Manderson, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* (2000); Pierre Schlag, *THE ENCHANTMENT OF REASON* 98–111 (1998) [hereinafter Schlag, *THE ENCHANTMENT*] (describing objectivist and subjectivist aesthetics in conceptions of American law); Brian E. Butler, *Aesthetics and American Law*, 27 *LEGAL STUD. F.* 203 (2003); Patrick O. Gudridge, *Mit Schlag (Repetitions)*, 57 *U.*

United States<sup>8</sup> privilege commercial actors by deterring consideration of legal limitations on commercial activity that could be socially desirable.<sup>9</sup>

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MIAMI L. REV. 607 (2003); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing an aesthetic connection between arguments for standards and altruistic political positions that challenge premises of classical liberalism, rules, and individualist positions that reinforce liberalism); Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005) (discussing aesthetic dimensions of technocratic approaches to law); Anna di Robilant, *The Aesthetics of Law*, in 1 GLOBAL JURIST ADVANCES 1 (2001), available at <http://www.bepress.com/gj/advances/vol1/iss2/art1/>; Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002) [hereinafter Schlag, *The Aesthetics*]; Jacqueline Stevens, *Legal Aesthetics of the Family and the Nation: AgoraXChange and Notes Towards Re-Imagining the Future*, 49 N.Y.L. SCH. L. REV. 317 (2004); Robin West, *Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985) (presenting legal theory as a form of narrative, an aesthetic object).

8. The term “commercial law” can have a slightly different scope in different jurisdictions. In the United States, it references the subjects included in the Uniform Commercial Code (“UCC”), and can also include some elements of bankruptcy law, laws governing asset securitization, and international conventions pertaining to these subjects. It is conceptually and statutorily separate from corporate law. In some foreign jurisdictions, “commercial law” includes a wider range of subjects, such as laws governing business entities. See, e.g., Henri Gunanto, *The Impact of U.S. Law Propositions on Indonesian Commercial Law*, 29 LOY. L.A. L. REV. 1047, 1047 (1996) (noting that commercial law in Indonesia includes the law on corporations and limited liability companies).

9. There are numerous possible limitations on commercial activity that could be socially desirable. Some exist in other jurisdictions, such as priority schemas that privilege wage or labor claims, for example. Others have been proposed to the drafters of the UCC and flatly rejected without serious consideration—for example, an equity carve-out to UCC Article 9’s priority structure. For an example of a hypothetical commercial law reform, consideration of which is deterred by aesthetics, see discussion *infra* notes 94–95. The project here is to present aesthetics of commercial law and explore how they obscure thorough vetting of these types of proposed reforms—not to defend the desirability of the specific reforms themselves. This work defines the gap between what exists (which is problematic) and what is ideal (which is yet to be determined). If defining this gap reveals that perhaps it cannot be bridged with a law reform proposal, that does not mean that there is nothing to be done about problems in commercial law. It just means that a proposal to reform commercial law statutes that offends the law’s aesthetics is not likely to have traction. Short

Problematic trends and features of commercial law take two different forms. First, there are types of commercial transactions encouraged by U.S. commercial law that raise both fairness and efficiency concerns. Such transactions include full priority secured lending<sup>10</sup> and asset securitization.<sup>11</sup> Second, the sheer size and volume of commercial transactions and the lack of legal controls requiring market actors to internalize ensuing economic, social, and environmental costs raise serious questions about the desirability of laws designed to encourage perpetually escalating levels of commercial activity.

These problematic aspects of commercial law invoke very difficult questions. How do we determine what levels and forms of commercial activity are optimal or good? If commitment to a more balanced or tempered approach to commercial activity were possible, who would be helped, who would be harmed, and how? Aesthetics of commercial law deter engagement with these questions by informing certain pre-reflective dispositions that enable common refrains against reform, such as: Any reduction in levels of commercial activity will most harm labor and the poor.<sup>12</sup>

Much of contemporary commercial law scholarship in the United States engages controversial questions in commercial law with economic modeling or with empiricism. Arguments about the efficiency of statutes encouraging secured lending or asset securitization, for example, have met unanswered (and perhaps unanswerable) empirical questions about the effects of these transactions on third parties. Now, prominent commercial law scholars pursue answers to empirical questions about the distributive consequences of U.S. commercial law. Empirical findings or successful economic models, however, do not automatically become fruitful bases for law reform. These findings encounter deep-running, visceral expectations of commercial law as an engine for economic development. Our collective, visceral expectations for commercial law are grounded in aesthetics.

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of reform of the UCC itself, there is a lot to be done in terms of activism and in terms of scholarship that considers how to use law to encourage commercial actors to pursue responsible, value-adding projects.

10. For a description of this type of financing and the fairness and efficiency issues it raises, see discussion *infra* notes 84–89.

11. For a description of this type of financing and the fairness and efficiency issues it raises, see discussion *infra* notes 100–02.

12. See discussion *infra* Part IV.A.

Karl Llewellyn, a central architect of the Uniform Commercial Code (“UCC”),<sup>13</sup> wrote in 1942 that “law out of harmony with life . . . cannot have right beauty.”<sup>14</sup> Remarks that cast the UCC in aesthetic terms—that speak of its beauty and logic—appear throughout its history.<sup>15</sup> This article is a twenty-first century take on U.S. commercial law that brings together current realities in the commercial world and contemporary approaches to legal aesthetics.

The lens of aesthetics offers insights into current formulations and trends in commercial law that analyses of the UCC drafting process or the technical complexity of the Code or ingrained ideological tilt (away from distributive justice) do not capture.<sup>16</sup> This critique has a political valence in that it expresses concern for distributive and environmental justice and a need for legal limitation on certain types of commercial activity. However, the aesthetics of commercial law themselves do not necessarily reflect any particular political leaning. The contention that certain aesthetics of commercial law privilege commercial actors is a statement about consequences of contemporary deployments of commercial law aesthetics, not about ideological bias inherent in these aesthetics. Commercial law itself and lawmakers, scholars, and practitioners who work in the field exhibit certain aesthetics that are constitutive of commercial law on a fundamental level. These aesthetics inform our collective sense of possibilities for commercial law before the questions of distributive justice or drafting process or technical feasibility even come into play.

The question of which aesthetics, and which approaches to commercial law, are the right ones or the best ones is not answered

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13. Citations herein to the UCC are to the official text and comments of the American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).

14. See K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 248 (1942).

15. See, e.g., White & Summers, *supra* note 1 (discussing “UCC Romanticism”); Carl Felsenfeld, *But the Proposed Uniform [?] Commercial Code Was Adopted*, 26 LOY. L.A. L. REV. 597 (1993).

16. This study is not interdisciplinary in the sense of comparing the branch of philosophy known as aesthetics to the study of law. Some works on law and aesthetics disavow the label interdisciplinary and characterize themselves instead as transdisciplinary. See, e.g., Manderson, *supra* note 7, at 36. Law and aesthetics is transdisciplinary in the sense that aesthetics is a dimension of human experience, which is already found in law. This article adopts the view that using aesthetics to analyze law is a transdisciplinary exercise.

here.<sup>17</sup> This is not a presentation of “dominant” aesthetics of commercial law, made with the hope of presenting some better, “alternative” aesthetics. The aesthetics of commercial law exist and are too non-rational to be susceptible to reasoned arguments for change. Understanding aesthetics of commercial law, however, is essential to recognizing and resisting visceral expectations that undermine meaningful engagement with tough questions about optimal levels and forms of commercial transactions. In other words, aesthetics cannot be reformed, but consequences of certain aesthetics can be altered in the process of considering the value of different approaches to commercial law.

Part I describes how this article uses aesthetics. Part II considers an energy aesthetic,<sup>18</sup> a grid aesthetic,<sup>19</sup> and an instrumentalist aesthetic<sup>20</sup> to assess how we apprehend commercial law and its possibilities.<sup>21</sup> Part III presents aesthetics of commercial law in relation to sublimity to describe simultaneous awe and fear surrounding large-scale commercial activity.<sup>22</sup> Part IV considers consequences of aesthetics of commercial law in the contexts of (1) common refrains against reform of controversial aspects of this law, and (2) the spread of a form of imperial law in which the export of U.S. commercial law models is complicit.

## I. AESTHETICS AND LAW

Some scholars contend that the field of aesthetics addresses form and that content is irrelevant; others reject the notion that form and content can be separated. This piece views the form and the content of commercial law as inseparable in understanding the aesthetics of this law.<sup>23</sup> Similarly, some view aesthetics as form

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17. See sources cited *infra* notes 56–58 and accompanying text.

18. See discussion *infra* Part II.A.

19. See discussion *infra* Part II.B.

20. See discussion *infra* Part II.C.

21. The grid and energy aesthetics have been described in work by Pierre Schlag. See generally Schlag, *The Aesthetics*, *supra* note 7. Schlag also describes an objectivist aesthetic that is like the instrumentalist aesthetic discussed *infra* Part II.C. For a discussion of how this work builds upon and departs from Schlag’s work, see *infra* Part I.

22. See discussion *infra* Part III.

23. Note the difference between this article’s use of aesthetics as opposed to semiotics or epistemology. Semiotics is concerned with the meaning that form references, with the meanings associated with or referenced by signs; it can be closely related to aesthetics. See Roberta Kvelson, *Introduction: Dialectic, Conflicts in Cultural Norms, Laws and Legal Aesthetic*, in LAW AND

only and others view aesthetics also in terms of effects (such as sublimity). This work looks to effects of commercial law—including some sublime effects—in its understanding of both the aesthetics of commercial law and aesthetic consequences of commercial law. The purpose, here, is to excavate suppressed, constitutive elements of U.S. commercial law—not to maintain fidelity to a particular branch of philosophy.

The question arises: Is it legal aesthetics that privilege commercial actors and not politics or ideology?<sup>24</sup> Politics and ideology strive for coherence of normative commitments or values. The pre-reflective preferences or vantage points in commercial law that this article presents are best captured by aesthetics in that they

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AESTHETICS, *supra* note 7, at 1 (treating aesthetics as the normative basis for the symbolic order). Kevelson's view places aesthetics beyond the self-referentiality of the semiotic world. *Id.* For Kevelson, aesthetics is a crucial part of semiotics in that it can explain the ordering of signs that are integral to law. *Id.* On the other hand, Desmond Manderson finds that, though both semiotics and aesthetics emphasize the infinite, pervasive influence of symbols, they are very different approaches. See Manderson, *supra* note 7, at 38–39. Semiotics studies placeholders for deeper meaning. Aesthetics captures how we feel about both signs and the things to which they refer. Aesthetics does not precede or transcend the circle of signs or semiotic representations. It merely asserts that the form of something is part of its meaning.

The focus here will be on the structure of commercial law and the meanings, visceral feelings, and pre-reflective responses to such structure that shape the possibilities and functions of commercial law. This article may consider symbolic elements or qualities of the UCC and discuss the meanings such elements reference.

Like semiotics, epistemology can be closely related to aesthetics, and scholars have differing approaches to the relationship between these fields. In contrast to Nelson Goodman's approach, for example, some scholars regard aesthetics as limited to considerations of form itself, as not encompassing the content or effects of form. Nelson Goodman, a prominent philosopher working in the field of epistemology and aesthetics, regards aesthetics as a branch of epistemology. See Catherine Z. Elgin, *Goodman, Nelson, in A COMPANION TO AESTHETICS* 175 (David Cooper ed., 1992) (describing Goodman's central contention that aesthetics explain how art enhances understanding, making aesthetics a branch of epistemology). Aesthetics (and semiotics) can be central to how we know what law is and what law can do. To the extent that this article's analysis of the aesthetics of commercial law speaks to how we come to know what commercial law and commercial activity are, it may be described as epistemological.

24. For additional explanation of the difference between aesthetics of law and ideology in law, see discussion *infra* note 38.

precede and defy the kinds of attempts at reasoned justification that are the hallmark of ideological or political commitments.

Scholarship on law and aesthetics has taken a variety of forms.<sup>25</sup> The scholarship on law and aesthetics that is most relevant to this article treats law itself as an aesthetic phenomenon.<sup>26</sup> In a discussion of critical legal studies and images of law, Adam Geary writes: "Just as the image represents and distorts reality by making what is fluid appear fixed and

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25. The most straightforward applications of aesthetics to law involve analysis of laws related to beauty or art. For example, scholars have analyzed how presentation of disfigurement has affected tort law and how a widow's beauty and chances of remarriage are calculated by the court. *See, e.g.*, Manderson, *supra* note 7, at 41 (discussing *Natanson v. Kline*, 350 P.2d 1093 (Cal. 1960)); *see also* *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (Can.); Manderson, *supra* note 7, at 28. Treatment by courts and legislatures of issues like the protection of the environment reveal how the law responds to beauty. Zoning regulations (and adjudication of challenges to such regulations) recognize and validate aesthetic considerations as a basis for limiting property rights. *See* LAW AND THE IMAGE, *supra* note 7, at 4 (discussing the Supreme Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954), that it is within the power of the legislature to limit property rights in order to ensure that a community be beautiful, spacious, and clean, among other considerations).

Other scholars have addressed how the architecture, images, and iconography of law are central to constructions of legal authority. *See, e.g.*, Peter Goodrich, *Specula Laws: Image, Aesthetic and Common Law*, in LAW AND AESTHETICS, *supra* note 7, at 205; Martin Jay, *Must Justice Be Blind? The Challenge of Images to the Law*, in LAW AND THE IMAGE, *supra* note 7, at 19. Peter Goodrich, for example, considers the aesthetics of courthouses, robes, statuary, and insignia in production of legal text. *See generally* Goodrich, *supra*. Martin Jay explores representations of the goddess Justitia and the contemporary convention of presenting Justitia as blind or blindfolded in allegorical images of Justice. *See generally* Jay, *supra*; *see also* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987). Institutions, like courts and law firms, are aesthetically packaged to convey authority. Butler, *supra* note 7, at 209.

In manufacturing its own legitimacy, law offers justification grounded in an aesthetic of reason. *Id.*; *cf.* Schlag, THE ENCHANTMENT, *supra* note 7, at 133 (describing the rationalist self as a construction of aesthetics).

In a slightly different vein, Christine Haight Farley critiques how adjudicators address the question of what is art. *See* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005) (arguing that judges should engage the field of aesthetics in adjudication involving questions about art).

26. *See, e.g.*, sources cited *supra* note 7 and accompanying text.

unchanging, law is criticized as a reification of the world.”<sup>27</sup> Desmond Manderson finds that to engage the aesthetic is to consider what the law actually means to us and how it does so. He writes:

It is part of what Derrida calls the “white [transparent] mythology” of the West to characterize its law as being purely logical and without those mythic and mystic elements which exist only in more “primitive” societies . . . . The task of aesthetics is to explore and reclaim these elements . . . from the interstices and margins of the law.<sup>28</sup>

Building on Geary and Manderson, Pierre Schlag, in *The Aesthetics of American Law*<sup>29</sup> (“*The Aesthetics*”), describes law as an aesthetic enterprise.<sup>30</sup> Schlag presents the aesthetics of law, meaning the recurrent forms that shape the creation, apprehension, and identity of law.<sup>31</sup> He writes: “Legal aesthetics are important because they help to constitute the law and its possibilities in different ways. Often these constitutive effects occur at a prereflective level.”<sup>32</sup>

Schlag presents in *The Aesthetics* four basic legal aesthetics that characterize American law: (1) the energy aesthetic; (2) the grid aesthetic; (3) the perspectivist aesthetic; and (4) the dissociative aesthetic.<sup>33</sup> The energy aesthetic presents law as moving and changing in the constant push and pull of varying principles, policy objectives, political valences, and values.<sup>34</sup> Law cast in the energy aesthetic is directional—it progresses.

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27. Geary, *supra* note 7, at 25.

28. Manderson, *supra* note 7, at 37.

29. Schlag, *The Aesthetics*, *supra* note 7.

30. Schlag’s approach in *The Aesthetics* is more extensive than his approach to legal aesthetics in *The Enchantment*. Compare Schlag, *The Aesthetics*, *supra* note 7, with Schlag, *THE ENCHANTMENT*, *supra* note 7. *The Aesthetics* sets out major categories of recurring forms, experiences, and pre-reflective stances that pervade American legal thought and lawmaking. Schlag, *The Aesthetics*, *supra* note 7.

31. Several scholars have criticized Schlag’s work in *The Aesthetics*. See, e.g., Butler, *supra* note 7; Dennis M. Davis, *Dissonance Orientation: The Occupational Hazard of Being a Judge or a Requirement for the Job?*, 57 U. MIAMI L. REV. 853 (2003); David A. Westbrook, *Three Meditations on How Law Rules After Globalization*, 12 MINN. J. GLOBAL TRADE 337 (2003).

32. Schlag, *The Aesthetics*, *supra* note 7, at 1117.

33. *Id.* at 1051–52.

34. *Id.*



The grid aesthetic, on the other hand, pictures law as divided into bounded spaces or categories. Doctrines are divided into rules, which are divided into elements. Different areas of law—labor law, property law, family law, tax law—are parceled into discrete areas with well-marked boundaries. The grid aesthetic enables and is produced by, for example, drafting statutes with categorical definitions.

The perspectivist aesthetic views law as mutating in response to the social or political identity of the viewer. The perspectivist aesthetic enables and is produced by, for example, the practice of rejecting the “reasonable person” standard in tort law in favor of, as appropriate, a reasonable woman standard, a reasonable battered woman standard, etc.<sup>35</sup>

The dissociative aesthetic conveys the collapsibility of all other legal categories, perspectives or aesthetics. It pictures law as highly unstable and legal categories or distinctions in perpetual disintegration. The identifiable relations of perspectivism, the fixed identities of the grid, and the quantifiable magnitudes of energy have all collapsed, and attempts to resurrect them appear futile.<sup>36</sup> The dissociative aesthetic is an experience of radicalized perspectivism in which legal actors feel a collapse of sustainable differentiations.<sup>37</sup> Legal actors frequently encounter the dissociative aesthetic as they engage the complexity of legal problems. This aesthetic then necessarily yields to a reduction to arguments steeped in an energy, grid, or even perspectivist aesthetic in order to do lawmaking.

In addition to these four basic categories of legal aesthetics, in his earlier work Schlag describes objectivist and subjectivist aesthetics of law. These aesthetics capture how we see law as an object (principles and rules treated as if they had the attributes of physical reality) and a subject (endowed with a will for binding, counseling, allowing, etc.) at the same time.<sup>38</sup>

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35. For a discussion of incoherence that can arise when litigators deploy the perspectivist aesthetic, see Heather Lauren Hughes, *Contradictions, Open Secrets, and Feminist Faith in Enlightenment*, 13 HASTINGS WOMEN’S L.J. 187, 204–05 (2002) (discussing the act/status dilemma as it relates to a battered woman litigant and arguments that courts should consider what is reasonable from her perspective).

36. Schlag, *The Aesthetics*, *supra* note 7, at 1052.

37. *Id.* at 1092–93.

38. See Schlag, *THE ENCHANTMENT*, *supra* note 7, at 98–111. Schlag’s presentation of objectivist and subjectivist legal aesthetics can function as another version of the presentations of internal incoherence in law that recur in critical legal scholarship. See Duncan Kennedy, *Pierre Schlag’s The*

Enchantment of Reason, 57 U. MIAMI L. REV. 513, 528–34 (2003) (book review).

This article understands *The Aesthetics* to be presenting a multiplicity of some major (but certainly not all) pre-reflective, conflicting aesthetics in American law. To the extent that these various aesthetics co-exist and conflict in ways that are logically irreconcilable, they indicate incoherence in law. Schlag's approach to legal aesthetics differs from the critical legal studies ("CLS") incoherence and indeterminacy thesis, however. Schlag presents a multiplicity of conflicting conceptions of law and legal argumentation that co-exist in infinite combinations, not paired argument tropes or ideological impulses that exist in intractable contradiction. Cf. Pierre Schlag, LAYING DOWN THE LAW 79–90 (1996). In contrast, the basic CLS presentation of incoherence describes conceptual contradictions (between, for example, value objectivity and subjectivity, free will and determinism, individualism and altruism) that are paired in binary opposition, that cannot be consistently reconciled, and that pervade liberal legal thought. See generally Kennedy, *supra* note 7. These contradictions are understood in part as a reflection in legal rhetoric and thought of binary oppositions in language described in the work of twentieth century Continental philosophers. CLS theory argues that liberal legal thought suppresses recognition of conceptual contradictions by de-emphasizing one of the two poles within a contradiction (for example, altruism), leaving the opposite pole (individualism) in a privileged position in legal discourse. This suppression of contradiction and privileging of one pole facilitates ideological bias in law, as, for example, individualism (as opposed to altruism) tends to reinforce premises of classical liberalism that we commonly associate with ideological conservatism or the political right. See generally Mark Hager, *Against Liberal Ideology: A Guide to Critical Legal Studies*, by Mark Kelman, 37 AM. U. L. REV. 1051 (1988) (book review); Kennedy, *supra* note 7; Duncan Kennedy, A CRITIQUE OF ADJUDICATION (1997); E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415 (2000); John Stick, *Charting the Development of Critical Legal Studies*, 88 COLUM. L. REV. 407 (1988) (reviewing Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (1987)). In addition, CLS theory contends that incoherence in law yields indeterminacy of result and indeterminacy of justification in adjudication. This is because the two sides of conceptual contradictions are inextricable and intractable such that a judge can deploy either side in any case, enabling a reasoned opinion in favor of either party. See generally Kennedy, *supra*; Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Many legal actors, and most CLS scholars, understand indeterminacy as a situs of inevitable ideological intervention in lawmaking. The CLS notion that ideological bias is inherent in lawmaking stems from these theories about the consequences of a certain mode of incoherence in law (rooted in understanding of binary oppositions). However, ideological bias is not necessarily inherent in all forms of incoherence. Various

Schlag's energy, grid, perspectivist, dissociative, and objectivist/subjectivist aesthetics are legal in the sense that they are instanced in the traditional legal materials, used in opinions, rules, doctrines, etc.<sup>39</sup> Moments of deploying aesthetics in law are unavoidable and do not answer to choice or reason (except if the aesthetic in place has already situated choice and reason as determinative).<sup>40</sup> Schlag writes: "To appreciate the aesthetic dimension of law is to understand that the forms of law mark not only the law we apprehend as already in place, but also the ways in which we think and do law and the ways in which we imagine its future."<sup>41</sup>

This critique takes parts of Schlag's basic legal aesthetic taxonomy, applies them to commercial law, and explores consequences of the aesthetics of commercial law in terms of sublimity<sup>42</sup> and in terms of concerns for global justice.<sup>43</sup> It departs from Schlag's approach in some important ways. First, Schlag's presentation of the dissociative aesthetic invokes the sublime—the term that the field of aesthetics uses to denote fantastic horror or awe.<sup>44</sup> Perhaps Schlag declined to explicitly relate this legal aesthetic to the sublime in order to avoid any idealization of aesthetics. I share Schlag's distaste for romanticization of law and idealization of aesthetics. However, it is crucial to consider

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aesthetics of law present irreconcilable, pre-reflective preferences embedded in law and legal thinking. They do not, in and of themselves, indicate political or ideological valence.

The contention that certain aesthetics of commercial law privilege commercial actors is a statement about consequences of current deployments of legal aesthetics in the commercial law context, not about ideological bias in the legal aesthetics themselves. Note that The Honorable Dennis M. Davis criticizes Schlag for "conceptualiz[ing] productive relations in particular and capitalism in general out of existence." Davis, *supra* note 31, at 858. Davis endows law as Schlag presents it with a strong political orientation. *Id.* at 858–59. Davis may find ideological bias in law as Schlag presents it, but, again, this bias is best understood as evident in, or even endemic to, contemporary deployments of certain aesthetics, not as endemic to the various aesthetics of law.

39. Schlag, *The Aesthetics*, *supra* note 7, at 1052.

40. *Id.* at 1102.

41. *Id.* at 1109.

42. See discussion *infra* Part III.

43. See discussion *infra* Part IV.

44. See discussion *infra* Part III. See generally Mary Mothersill, *Sublime*, in A COMPANION TO AESTHETICS, *supra* note 23, at 407–12.

sublimity in the context of the grandiose adulation of both commercial law and commercial activity that persists despite menacing environmental, cultural, and financial effects of this law and activity.<sup>45</sup>

Second, Schlag contends that once conflicts in law are understood as contests among conflicting aesthetics, debate effectively ends. He states: "Indeed, once a dispute becomes explicitly aesthetic, rational argument has reached a kind of terminus. Once a dispute becomes explicitly a contest of aesthetics, there is not a whole lot more to say . . . ."<sup>46</sup> Schlag is right if he means that there is no coherent meta-theory or mode of reasoning that can be deployed to settle conflicts within law or among legal solutions or approaches.<sup>47</sup> The aesthetic nature of law and legal argumentation compounds this reality.

However, there is a whole lot more to say about the consequences of the aesthetics of law, and especially commercial law. David A. Westbrook writes:

Our awareness of judgment, aesthetic qualities, at the root of our reasons means that the epistemological status of our thoughts and arguments are uncertain. We know that our own minds are strange to us. Such awareness, however, does not mean that thought is impossible for us or that we somehow have been excused . . . . While recognition of the aesthetic aspect at the foundations of our thinking may be regarded as, in some sense, a terminus of reason, it should also be regarded as the beginning of thought.<sup>48</sup>

Reason may not solve conflicts among differing, aesthetically constituted legal tacks. However, excavating the particular aesthetics of U.S. commercial law may assist legal actors in seeing how U.S. commercial law models embody non-rational and parochial preferences. Once these non-rational qualities are taken

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45. Note that, though beyond the scope of this article, it would also be interesting to consider the sublime in relation to the heightened experience of the dissociative aesthetic in transnational contexts generally.

46. Schlag, *The Aesthetics*, *supra* note 7, at 1105.

47. See generally Kennedy, *supra* note 7; Schlag, *THE ENCHANTMENT*, *supra* note 7.

48. Westbrook, *supra* note 31, at 342–43. Cf. Butler, *supra* note 7 (arguing that Schlag offers a misguided conception of what labeling something "aesthetic" means in the study of law). Butler interprets Schlag's approach to aesthetics as marking the limit of the rational. *Id.* However, Butler thinks of aesthetics and rationality as two separate tools or experiences in a way that Schlag would not.

into account, they may appear compatible or incompatible with the aesthetics and priorities of others.

Obviously, this approach (1) raises the problem of reflexivity, (2) raises the issue of whether legal aesthetics reflect cultural values, and (3) contemplates some future engagement with the question of which aesthetics (and which approaches to commercial law) are right or good. The problem of reflexivity is that this article itself deploys particular aesthetics, raising a question as to what justifies the use of these aesthetics to analyze others.<sup>49</sup> This problem is not solvable—all possible solutions are aesthetically constituted such that the problem simply replicates. (This article, for example, exhibits the grid aesthetic, among others. If anyone found the aesthetics of this article to be a worthy subject of critique I would be flattered.)

There may not be any even remotely coherent justification for using the aesthetics that constitute this article to critique the aesthetics that constitute commercial law. The purpose here is to make a presentation—certainly not the only possible one—of U.S. commercial law as in a fundamental way non-rational by showing some aesthetics that constitute it. Revelation of non-rational, pre-reflective aspects of commercial law creates room for the possibility of meaningful engagement with questions about the true costs and effects of current formulations of commercial law.

The implication that legal aesthetics are culturally specific pervades writing on the subject. Schlag's examples are all drawn from U.S. law and he describes some of the aesthetics he discusses as manifesting themselves most prominently at specific points in U.S. history.<sup>50</sup> He also occasionally identifies objects of perspectivist (and other) malaise, for example, as Anglo-American or typical of Anglo-American thought.<sup>51</sup> He does not, however, otherwise address cultural specificity.<sup>52</sup> Other cultures may very well experience legal aesthetics that are highly similar to, if not the

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49. Cf. Schlag, *The Aesthetics*, *supra* note 7, at 1101–04, 1054 n.23.

50. See *id.* at 1053–54.

51. *Id.* at 1084.

52. Perhaps the cultural specificity of the aesthetics of American law in Schlag's project is simply too obvious to warrant discussion. Note that, in *The Enchantment*, Schlag does state that his claims "refer to American law and American legal thought." Schlag, *THE ENCHANTMENT*, *supra* note 7, at 14. "The social and intellectual contexts in which law and legal thought is produced in other countries," he continues, "is likely to differ and to require a different analysis." *Id.* But see Davis, *supra* note 31, at 853–54 (finding that Schlag's central claims in *The Enchantment* are applicable to many countries).

same as, those we experience in the United States.<sup>53</sup> Comparative law scholars have vigorously debated whether laws or legal systems can be universalized, or whether they are, on some level, irreducibly culturally specific.<sup>54</sup> This article does not intend to add to this debate. Presenting aesthetics of commercial law and how these aesthetics privilege commercial actors does not require resolution of the question of whether these aesthetics reflect U.S. culture.<sup>55</sup> The purpose here is not to assert the cultural peculiarity

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53. Duncan Kennedy's point that there is an aesthetic alignment of altruistic arguments with standards and individualist arguments with rules seems to extend to all of "private law adjudication"—a category of lawmaking that extends, at least, to the common law jurisdictions. *See generally* Kennedy, *supra* note 7.

54. For arguments that law is culturally specific, see, for example, Benjamin Geva, *Uniformity in Commercial Law: Is the UCC Exportable?*, 29 LOY. L.A. L. REV. 1035, 1038 (1996) (arguing that "law, very much like language or religion, is strongly culturally based"); Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22, 40; and Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 62 (1996) (contending that epistemological differences between the common and civil law systems are irreducible). For arguments focusing on the universal qualities of law, see, for example, H. Patrick Glenn, *Harmonization of Law, Foreign Law and Private International Law*, 1 EUR. R. PRIVATE L. 47 (1993) (on a global harmonization of laws); and Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994) (contending that there is a common core of efficient principles embedded across diverse legal systems). *See also* Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 641 (2002) (observing the contradictory notions in classical legal thought that "[t]he law of a nation was a reflection of the spirit or culture of its people, and in this sense inherently political, but could be developed in a scientific manner by jurists who presupposed its internal coherence").

55. It is worth pointing out, however, that the aesthetics of commercial law must be culturally specific at least in the sense that they arise out of the context of the development of the UCC in the United States. This context steepens in cultural specificity in the forms of, among other things: (1) the particular history of legal realism and legal formalism in the United States; (2) the American Law Institute's (and National Conference of Commissioners on Uniform State Law's) efforts to draft codes in order to create uniformity of laws across common law jurisdictions; and (3) the particular individuals in the United States whose thinking has most influenced the UCC. These individuals, of course, took inspiration from foreign as well as U.S. sources. *See, e.g.*, Karl N. Llewellyn & E. Adamson Hoebel, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (Univ. of Okla. Press 1967) (1941) (exemplifying the realist interest in sociological and anthropological approaches

of the aesthetics of U.S. commercial law, but rather to explore what the particular aesthetics of this law are, regardless of whether they are rare or common to the experiences of legal actors around the world.

The methodology of this work obviates addressing the “rightness” question with respect to specific formulations of commercial law in any satisfying way.<sup>56</sup> This critique may inform legal actors who address the question of which aesthetics and forms of commercial law are best. Note that even if these legal actors subscribe to perspectivist or dissociative aesthetics,<sup>57</sup> the question of rightness dominates lawmaking efforts. Schlag writes that, from the vantage point of perspectivist and dissociative aesthetics, rightness “is demoted in favor of other enterprises” to become “one concern among many,” thus losing any “claims to universality or intellectual supremacy.”<sup>58</sup> Such a demotion of rightness, however, seems impossible. What other concerns exist and what justifies their consideration if not a sense that, at least,

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to the study of law); Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625 (1993) (noting civil law elements in the inception of the UCC); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435 (2000) (discussing the influence of civil law models on codification projects such as the UCC); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987) (discussing the influence of the German professorial model on Llewellyn); see also John M. Conley & William M. O’Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 L. & SOC. INQUIRY 179 (2004) (book review); Ajay K. Mehrotra, *Law and the “Other”: Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way*, 26 L. & SOC. INQUIRY 741 (2001) (book review). “Cultural specificity” does not mean that the laws in question evolved separately and without influence from other systems. See generally P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition,”* 51 HASTINGS L.J. 479 (2000) (discussing non-Western sources of “Western” law).

56. Schlag states that the possibility that a position can be “right” in the first place depends upon the aesthetics of those engaging the question. See Schlag, *The Aesthetics*, *supra* note 7, at 1107. The aesthetics of those engaging a question determine what the possible, “right” legal arguments or solutions to the question may be. However, Schlag’s implication that an aesthetic exists in which there is no right/wrong dualism seems inaccurate. Rejecting the possibility of “right” legal arguments is itself a form of rightness argument.

57. See sources cited *supra* notes 33–37 and accompanying text.

58. Schlag, *The Aesthetics*, *supra* note 7, at 1108–09.

the range of concerns on the table is the right one? The rightness argument at issue here concerns the nature and consequences of aesthetics of commercial law.

## II. AESTHETICS OF COMMERCIAL LAW

Certain aesthetics obscure consideration of alternatives to current formulations and trends in commercial law that can be problematic. Parts of the UCC have been called a “beautiful exercise,”<sup>59</sup> that create a “logical and flowing treatment”<sup>60</sup> of security interests, for example. However, the alleged beauty of commercial law is not central to understanding its aesthetics.

Several types of sources evidence the aesthetics of commercial law. The UCC itself exhibits particular aesthetics. In addition, certain often repeated characterizations of the Code in secondary sources by scholars and practitioners evidence aesthetics of the Code.<sup>61</sup> Finally, descriptions of the UCC’s purpose and intent offered by its drafters and official commentators evidence certain aesthetics.

### A. *The Energy Aesthetic*

Drafters and proponents of the UCC present the Code in terms of the energy aesthetic. This aesthetic masks the UCC’s constitutive force. The energy aesthetic exhibits itself as progressive legal change, as reform, as rejection of static qualities, as law on the move, responding to the changing needs of society.<sup>62</sup> The UCC claims to be energy evolving in response to energy—the forward-looking evolution of the commercial world. This sense of the Code denies (1) the extent to which the UCC creates and causes the behavior of commercial actors, and (2) the extent to

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59. Felsenfeld, *supra* note 15, at 605–06.

60. *Id.*

61. As discussed below, these include characterizations of the UCC as technically masterful, efficient, flexible, responsive to the needs and priorities of commercial actors, and practical.

62. For an older presentation of law as energy or facilitating release of energy, see James Willard Hurst, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3–32 (1956). In a chapter titled “The Release of Energy,” Hurst argues that the dominant value driving nineteenth century U.S. law is “not the jealous limitation of the power of the state, but the release of individual creative energy.” *Id.* at 7. Hurst’s focus on release of energy as a central objective of law exemplifies an energy aesthetic in law.



which commercial practices themselves depend upon more fixed and formalist elements of law.

The drafters of the UCC themselves express the energy aesthetic. The Permanent Editorial Board (“PEB”) for the UCC (and its constituent organizations, the ALI and NCCUSL) issue comments and reports on the text of the Code. The PEB has undertaken to revise various articles of the UCC at appropriate intervals. The following statements regarding recent revisions to the UCC are from the Forward to the Official Text and Comments to the 2004 edition:

The primary goal was not to create new law but rather to bring the articles up to date in terms of modern business practices and technology . . . . [Article 8] was revised in 1994, primarily to provide a full set of rules for the “indirect holding system” that had developed in the securities markets in order to facilitate trades . . . . [T]he PEB and the sponsoring organizations have been cognizant of the need to amend and revise the articles in a manner that comports with modern commercial practices, including the now-prevalent use of electronic methods of doing business.<sup>63</sup>

The PEB views the UCC as responding to constantly evolving practices in the commercial world. Business practices evolve and allegedly become ever more “modern.”<sup>64</sup> It is the job of the drafters of the UCC to react to this progress by codifying the rules and norms that commercial practices reflect. Technology and commercial practices develop in tandem. The law—the UCC—responds to encourage and facilitate these tandem forces driving commercial activity. It is law as energy, charging forward, reacting to and partnering with the forward-moving energy of the commercial world. The PEB denies even that it intends to create new law. Rather, it simply updates the UCC to keep it current with ever-changing business practices. The market determines the law; the law reflects and facilitates the market.

The PEB continues by thanking those “who patiently worked to improve the laws so crucial to the economy of the United States.”<sup>65</sup> The PEB recognizes the centrality of law to commercial practices, yet it insists upon a narrow view of commercial law’s importance. This law is crucial in that, if not well-drafted and

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63. Lance Liebman, *Forward* to UNIFORM COMMERCIAL CODE xxv (2004).

64. For a critique of this notion that commercial practices and commercial law are “modern” or constantly “modernizing,” see discussion *infra* Part IV.B.2.

65. Liebman, *supra* note 63, at xxvi.

updated, it could create stumbling blocks for commercial actors or cause inefficiencies. It must maintain its momentum to keep up with the energetic economy that it serves.

Consider the official comment to U.C.C. § 2-101, introducing the UCC's departure in Article 2 (Sales) from the notion that legal consequences turn upon the passing of title from the seller to the buyer: "The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something . . . ." <sup>66</sup> In other words, the UCC is for practical men. Practical men should not be made to fret over legal formalities that are too abstract and archaic to be of value to the commercial world. Karl Llewellyn found the use of property "pigeonholes" too static, too absolutist to serve as a basis for resolving commercial disputes. <sup>67</sup> The UCC's purpose is to move commercial law forward by making it more adaptable to the practical issues that commercial actors face.

This energy aesthetic privileges commercial actors in that, whatever forms into which financings evolve, however business practices develop, once they become common modes of moving large amounts of capital, commercial law will likely seek to accommodate them. Commercial actors are privileged in that the UCC views commercial practices as prior to the law. These actors realize this privilege when commercial practices develop that courts and legislatures sanction in light of projected economic consequences of threatening dominant market conventions.

The energy aesthetic surfaces in adjudication of commercial law cases as decisions abound which use commercial utility as a justification in their reasoning. <sup>68</sup> Ross Cranston notes that Lord Mansfield's judgments provide various examples. <sup>69</sup>

For a contemporary example, consider the U.S. district court's opinion in *Granite Partners, L.P. v. Bear Stearns & Co.* <sup>70</sup> This

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66. U.C.C. § 2-101 cmt. (2000).

67. Michael G. Bridge et al., *Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL L.J. 567, 573 (1999).

68. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCd, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014 (Del. Super. Ct., Sept. 3, 1999); but see *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000).

69. See Ross Cranston, *Commercial Law and Commercial Activity*, in COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 274, 284 & n.50 (Ross Cranston & Roy Goode eds., 1993) [hereinafter COMMERCIAL AND CONSUMER LAW].

70. 17 F. Supp. 2d 275 (S.D.N.Y. 1998) (holding that UCC Article 9 does not apply to a repurchase agreement in which the parties explicitly stated intent

case held that transactions conducted under a securities repurchase agreement, or “repo,” constitute sales and not secured loans.<sup>71</sup> Under a repo, a seller sells a security to a buyer. The buyer in a repo is a securities broker and the seller is the broker’s customer. The seller agrees to repurchase the security within a specified period of time at a specified price that typically reflects the purchase price plus a margin that may be regarded as a creditor’s interest charge for a loan. If the seller fails to repurchase, the buyer typically has the right to sell the security on the open market to satisfy the seller’s liability.

Repos are hybrid transactions that contain elements of both sales and secured loans. Courts, like the court in *Granite Partners*, have had to address the issue of whether repos constitute sales or secured loans in order to determine the rights and liabilities of the parties when a dispute arises. On the one hand, the buyer (broker) has the right to dispose of the securities if the repurchase obligation is not met. On the other hand, the purpose of these transactions is to finance purchases of securities by the seller (broker’s customer). It is the “buyer’s” loan, in the form of the “purchase price” that enables the “seller” to purchase the securities in the first place. The buyer holds the securities as collateral for this loan. The fact that the buyer can dispose of the securities if the seller fails to repurchase functions like a lender’s remedy upon default. Brokers have a strong interest in characterizing these transactions as sales because, as buyers, they are not obligated to dispose of the collateral in accordance with the strictures of UCC Article 9. Among other things, UCC Article 9 requires secured parties to dispose of collateral after default in a commercially reasonable manner and provides debtors with certain, non-waivable rights surrounding disposition of collateral.<sup>72</sup>

The parties in *Granite Partners* entered into an industry form repo agreement containing explicit language stating that the parties intend that all transactions thereunder be sales and purchases and not loans.<sup>73</sup> The court in *Granite Partners*, considering how to characterize this contract, found that this express language was sufficient evidence that the parties intended a sale.<sup>74</sup> The court

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to treat purchases as sales and not loans). For a discussion of the grid aesthetic at play in this case and how it, too, privileges commercial actors, see *infra* Part II.B.

71. *Granite Partners*, 17 F. Supp. 2d 275.

72. See U.C.C. §§ 9-610(b), 9-602 (2001).

73. *Granite Partners*, 17 F. Supp. 2d at 300–05.

74. *Id.* at 300–03.

subordinated the economic substance of the transaction and the subjective intent of the parties to the form of the agreement.

*Granite Partners* is one example of an opinion in which the energy aesthetic is at work.<sup>75</sup> From the vantage point of the energy aesthetic, law evolves to accommodate dominant market practices. Judge Sweet emphasizes brokers' needs for liquidity (that treating repos as secured transactions would undermine):

According to the [Bond Market Association], repos have evolved to fulfill certain market needs and objectives that cannot be served by secured loans . . . . Applying to repurchase transactions the provisions of Part 5 of UCC Article 9<sup>76</sup> . . . which governs the disposition of collateral after default, . . . would undermine the requisite flexibility of the repo market.<sup>77</sup>

If subjecting the brokers to UCC Article 9 would slow down the market, then it is better that they are sales. The opinion also emphasizes that the securities at issue in *Granite Partners* are mortgage-backed securities, the purchase and free trade of which are crucial to the nation's housing markets.<sup>78</sup> If the housing market has evolved to rely upon certain modes of financing in which mortgages are collateral for certain types of securities, it is the law's place to accommodate this evolution—not to complicate it or slow it down by analyzing the underlying economic substance or subjective intent of the parties.

Yet, as commercial law scholar Jeanne Schroeder observes in a critique of *Granite Partners*, this logic “can be used to justify *any* pro-financer rule.”<sup>79</sup> The fact that a federal district court engages in this mode of reasoning is an example of the salience of the energy aesthetic in interpretation of commercial transactions. Schroeder's criticism only confirms this salience.

The energy aesthetic in commercial law—the UCC as expanding or contracting to make room for market innovations—can explain the efficacy of certain adjudicative tendencies. For example, Judge Sweet in *Granite Partners* exhibits realist

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75. Of course, the energy aesthetic is not the only aesthetic at play in this example. See *infra* note 113 for a discussion of *Granite Partners* as an example of the grid aesthetic.

76. Note that “Part 5 of UCC Article 9” in the opinion corresponds to Part 6 of revised UCC Article 9. See *Granite Partners*, 17 F. Supp. 2d at 303.

77. *Id.* at 302.

78. See *id.* at 303–04.

79. Jeanne L. Schroeder, *A Repo Opera: How Criimi Mae Got Repos Backwards*, 76 AM. BANKR. L.J. 565, 568 (2002).

tendencies in that he considers market consequences of classifying the contract at issue as a secured loan and not a sale.<sup>80</sup> Realism itself is a school of legal thought—it is concerned with legitimacy of lawmaking processes.<sup>81</sup> Legal aesthetics, on the other hand, are the pre-reflective preferences that affect our sense of the efficacy of various theories of legitimation. Judges employ both legal aesthetics and theories of law. The point is to consider how certain aesthetics in commercial law—in this case, the energy aesthetic—enable certain adjudicative moves—in this case, referencing financiers' needs for liquidity as part of the rationale for a holding. Aesthetics make realist strategies, including the judge's choice of relevant facts and factual outcomes, seem logical to others.<sup>82</sup> Consider Judge Sweet's (1) choice of important consequences—brokers' need for liquidity and the extra importance of this need in the context of mortgage-backed securities—and (2) willingness to name these particular consequences in an opinion on the scope of UCC Article 9. That these facts, offered to serve these ends, make sense (to some, at least) indicates a pre-reflective preference, an aesthetic proclivity, for commercial law evolving to accommodate market needs.

The energy aesthetic drives evolution of the content of the UCC itself. For example, the recent overhaul of UCC Article 9 exemplifies the energy aesthetic. UCC Article 9 governs secured lending. It enables creditors to take security interests in a wide range of personal property, including assets that a debtor has not yet acquired or that are not yet in existence.<sup>83</sup> Article 9 gives

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80. It is not necessary here to analyze whether Judge Sweet's opinion exemplifies realist jurisprudence. The point here is just to see the difference between a legal school of thought, in this case realism, and a legal aesthetic such as the energy aesthetic.

81. Legal realism is complex to define. Essentially, it is a movement of legal theory and adjudication that began in the United States in the 1920s and 1930s that asserts that judges decide cases based upon the facts and not based upon the idea that legal rules require certain outcomes. Realism is the idea that, of the range of stimuli an adjudicator encounters (that includes formal rules), the facts of a case and the adjudicator's sense of the fair outcome based on the facts comprise the dominant stimuli. It is the linear predecessor of contemporary law and economics, feminist legal theory, critical race theory, and critical legal studies. *See generally* Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 261 (Dennis Patterson ed., 1999).

82. It would be very difficult to show whether legal aesthetics form prior to, or as a result of, developments in legal theory. Lawmaking draws upon both simultaneously.

83. *See* U.C.C. § 9-204(a) (2001).

secured creditors full priority in the assets assigned to them. This means that the secured creditor can recover the full value of its claim against the debtor before other creditors recover anything.

Many scholars have criticized full priority secured lending, charging that it is (1) unfair to creditors like employees or tort claimants who have no opportunity to consent to the transaction or adjust their compensation to reflect the risk of non-payment that a secured loan creates,<sup>84</sup> (2) inefficient in that it permits debtors to transfer costs to non-adjusting third parties,<sup>85</sup> and (3) potentially

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84. Lynn LoPucki states that “security is an agreement between A and B that C take nothing.” Lynn M. LoPucki, *The Unsecured Creditor’s Bargain*, 80 VA. L. REV. 1887, 1899 (1994). Arguments that full priority is justified under freedom of contract principles fail to explain why two parties—a debtor and secured creditor—are permitted to contract away the rights of third parties with no chance to consent or adjust their return. Employees are “non-adjusting creditors.” They generally cannot adjust their compensation to reflect the risk that a secured creditor will be paid before them. Tort claimants, on the other hand, do not choose to be creditors at all. They are “non-consenting creditors.” See generally *id.*; Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373 (1997). But see Steven L. Harris & Charles W. Mooney, Jr., *A Property Based Theory of Security Interests: Taking Debtor’s Choices Seriously*, 80 VA. L. REV. 2021 (1994) (replying to fairness concerns by contending that security interests are a form of property interest and as such are alienable despite effects on third parties in the same vein as all other transfers of property). Security interests under UCC Article 9 are interests in personal property that serve a range of functions distinct from transfers of real property that are foundational to property law. Also, from the vantage point of bankruptcy law, a debtor issuing a security interest is alienating property that belongs not only to it, but to the bankruptcy estate, which belongs to the debtor’s creditors as a group. See Lucian Arye Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1290 (1997).

85. See Lucian Arye Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Credit in Bankruptcy*, 105 YALE L.J. 857, 865 (1996) (analyzing full priority secured credit to show that costs of full priority can result in inefficient contracting between borrowers and lenders); see also generally Bebchuck & Fried, *supra* note 84.

The critique that secured lending persists because it enables debtors to transfer costs to non-adjusting creditors stems from what is known in commercial law literature as “the puzzle of secured credit.” The puzzle grew out of applications to secured lending of economists Franco Modigliani’s and Merton Miller’s theory that the value of a firm is not affected by its capital structure in a perfect market. See Franco Modigliani & Merton Miller, *The Cost of Capital, Corporation Finance, and the Theory of Investment*, 48 AM. ECON.

detrimental to debtors and unsecured creditors alike in that a secured creditor with a lien on all assets of a company enjoys an

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REV. 261 (1958). For a concise summary of this work by Modigliani and Miller, see William W. Bratton, CORPORATE FINANCE CASES AND MATERIALS 481–85 (5th ed. 2003). When UCC Article 9 was first created, people thought that secured credit served to lower costs of capital by lowering interest rates available to debtors that issue collateral. However, Modigliani and Miller showed that, in theory, altering the capital structure of a corporate entity should not change its value. *Id.* Investors will simply adjust the interest rate charged for debt and the amount they will pay for an equity interest to reflect the riskiness of the investment. See Modigliani and Miller, *supra*, at 261–97. Therefore, in theory debtors have no interest rate based reason to offer security to lenders. This finding raises the question: If an entity cannot change its average costs of capital by altering its capital structure, then why do debtors take on the transaction costs associated with issuing security for loans? See generally Alan Schwarz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984). Scholars focus on two general possibilities to explain this puzzle: (1) secured credit produces efficiencies, see, for example, Schwarcz, *infra* note 88; and (2) it exports costs to third parties, see, for example, Bebchuck & Fried, *supra* note 84, and Bebchuck & Fried, *supra*.

David Carlson has rejected the terms of the “puzzle of secured credit,” charging that (1) Modigliani and Miller’s theorem itself is flawed because it disregards the effect of capital structure on debtor behavior, and (2) in the context of secured lending its application depends upon several, irrational assumptions about secured loans. These include, according to Carlson, assumptions that debtors are borrowing themselves into insolvency and that proceeds of secured loans are used only to redeem equity. See Carlson, *supra* note 3 (arguing that ordinary price theory shows that secured lending is rational). The critique that Modigliani and Miller fail to consider the effect of capital structure on firm behavior originates in finance literature. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 332–33 (1976).

Also, since the irrelevance theorem (like many economic theorems) assumes a perfect capital market there are other real world factors that affect the puzzle of secured credit. For example, lenders are not deciding what rates to charge given a debtor’s value in a vacuum. Interest rates are heavily determined by regulatory forces.

Modigliani and Miller’s theorem has inspired extensive debate. The fairness question raised by full priority secured lending and the possibility that some debtors will use security to shift down-side risk to unsecured creditors persist regardless of whether the prospect of exporting costs explains the prevalence of secured lending generally. What portion of secured loans results in exporting costs to unsecured creditors is, again, an unanswered empirical question.

inordinate amount of control over the debtor that it can exercise to its own benefit.<sup>86</sup> Other scholars have responded to these criticisms, asserting that secured credit is (1) justified from the vantage point of property law,<sup>87</sup> (2) potentially efficient regardless of the existence of unsecured creditors,<sup>88</sup> and (3) beneficial in that the secured creditor's monitoring of debtor behavior will safeguard the debtor's financial viability and hence its ability to pay all creditors.<sup>89</sup> Definitive resolution of many of these issues (as they are presented in the legal academic literature) turns upon empirical questions that are unanswered and likely unanswerable.

UCC Article 9 permits a sophisticated creditor to recover the full value of its loan in advance of disadvantaged creditors like pensioners or judgment holders. This full priority structure raises serious fairness questions. Secured credit at least in some percentage of instances enables companies to externalize costs onto disadvantaged creditors. At the same time, secured loans in which debtors issue security without causing economic harm to unsecured creditors certainly exist.

Despite the robust, complex nature of the scholarly debate over secured lending and the questions that it raises, the revised version of UCC Article 9 enacted in 2001 only expands secured creditors'

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86. Many secured lenders seek control over a debtor by taking an Article 9 lien. They are not concerned only with their priority in bankruptcy. A secured loan agreement contains covenants and specifies events of default that can include detailed instructions for debtor performance and actions. The covenants, events of default, notice, and remedy provisions in the loan agreement permit the secured lender to police a debtor's behavior and to take certain actions on behalf of the debtor if the debtor defaults in any way. *See, e.g.,* Douglas G. Baird, *Secured Lending and its Uncertain Future*, 25 CARDOZO L. REV. 1789, 1792–96 (2004). In theory, the control that secured creditors gain over debtors could benefit unsecured creditors and equity holders since secured creditors are looking to be repaid, not to become involved in a bankruptcy. This theory is dubious, however, because a secured creditor's interests and direction to a company will not necessarily coincide with unsecured creditors' interests. *See* Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 671 (1997). Also, in bankruptcy a floating lien creditor will not represent unsecured creditors' interests. *See* Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 818–19 (2004).

87. *See* Harris & Mooney, Jr., *supra* note 84.

88. *See, e.g.,* Carlson, *supra* note 3; Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425, 429 (1997).

89. *See* sources cited *supra* note 86 and accompanying text.



domain.<sup>90</sup> Practitioners and commentators celebrate this expansion for its facilitation of access to credit. The increased commercial lending it enables facilitates the forward march of business finance. Law evolves in tandem with evolving business norms.

The energy aesthetic notion that commercial law has a momentum that tracks the momentum of ever-evolving forms of commercial activity obscures the UCC's origins and, along with them, the feasibility of alternative possibilities or trajectories for commercial law. Allen R. Kamp writes: "The first argument for the floating lien was that it was experimental and rare, so why not try it. Now the argument is that it is universal, so it must be good. One gets the feeling that its supporters will be for it, whatever the reality."<sup>91</sup> Kamp indicates that the floating lien<sup>92</sup> was a novel approach to security interests at the time of the creation of UCC Article 9. The notion that this legal innovation created current forms of and expectations for secured transactions is obscured by the energy aesthetic's view of commercial law as responding to market expectations that are already ever-expanding. Now that the floating lien is widely used and secured lenders have come to expect it, it seems beyond review. Kamp implies that the full priority floating lien has a momentum, an energy, that precludes

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90. For example, old Article 9 only covered deposit accounts insofar as they constituted proceeds of other collateral. *See* U.C.C. § 9-104(l) (1999). Revised Article 9 generally permits security interests in deposit accounts as original collateral. *See* U.C.C. § 9-109 (2001). Old Article 9 only applied to sales of receivables arising from goods or services transactions (accounts). *See* U.C.C. § 9-104 (1999). It did not cover rights to payment arising from other transactions. Revised Article 9 covers a broader spectrum of sales of receivables. The definition of "accounts" is expanded to include payment obligations arising from the sale, lease, or license of all kinds of tangible and intangible property. *See* U.C.C. § 9-102(a)(2) (2001). Revised Article 9 also covers commercial tort claims, software, and letter of credit rights, all of which were excluded under old Article 9. *See id.* §§ 9-102(a)(75), 9-102(a)(13), 9-102(a)(51), 9-107. Also, revised Article 9 elevates the claims of secured creditors above those of unsecured creditors in the event of filing defects. *See id.* §§ 9-516(b), 9-338.

91. Letter from Allen R. Kamp to author (May 4, 2006) (on file with author).

92. "Floating lien" is a short-hand term for the type of security interest permitted by UCC Article 9 that attaches to after-acquired collateral and that dates priority for future advances by the lender back to the date the lender first perfected its interest. *See* U.C.C. §§ 9-204, 9-205, 9-323 (2001). Again, for a discussion of the fairness and efficiency problems raised by UCC Article 9's full priority, floating lien structure, see sources cited *supra* notes 84–89 and accompanying text.

serious reconsideration of its merits. The recent overhaul of UCC Article 9—during which the drafters flatly dismissed proposals to soften its full priority structure in favor of disadvantaged creditors<sup>93</sup>—evidences this momentum.

Commercial law responds to secured creditors' and businesses' needs. Commercial law's constitutive qualities—the notion that market practices are created (and can be limited) by commercial law—are suppressed as the PEB, adjudicators like Judge Sweet, and the drafters of revised Article 9 treat commercial law as if it exists to serve the market.

### *B. The Grid Aesthetic*

The grid aesthetic is prominent in U.S. commercial law. It exacerbates ethical considerations regarding the environment and labor. In the grid aesthetic, law is a framed territory that can be mapped by subdivision into distinct parts: contracts, administrative law, etc. The grid aesthetic encourages micro thought. The bounded spaces and defined concepts (collateral security rules, labor regulations) can be treated as discrete subject matter, enabling division of labor among legal thinkers and lawmakers.

The grid aesthetic (so pervasive in the UCC) puts certain regulatory responses to commercial activity out of the purview of the Code *ex ante*. Imagine a provision making unenforceable security interests granted in exchange for loans that the debtor services with capital generated by violating certain labor or environmental standards. In theory, we could achieve such a hypothetical reform by revising U.C.C. § 9-203<sup>94</sup> to say that

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93. The Article 9 drafting committee rejected a “Carve-Out Proposal” submitted by Warren in April 1996 to amend U.C.C. § 9-301 to preserve twenty percent of debtors’ assets for unsecured creditors. Under Warren’s proposal, a levying creditor could obtain twenty percent of the value of Article 9 collateral through a levy and execution under state law. Accordingly, in bankruptcy, a trustee using her power could carve out twenty percent of the value of a debtor’s encumbered personal property for the benefit of the estate. At the Symposium on the Priority of Secured Debt at Cornell Law School in 1997, Steven Harris announced that a carve-out for unsecured creditors is “dead in the water.” Warren, *supra* note 84, at 1374 n.3. See also William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511, 1511–13 (1997).

94. Section 9-203 states the requirements for creating an enforceable security interest. See U.C.C. § 9-203 (2001). When a security interest is enforceable, a lender has the right to foreclose on the debtor’s assets if the

debtors do not have, within the meaning of the statute, “rights in collateral” acquired while in violation of, let us say, environmental regulations.<sup>95</sup>

Would this type of reform be good? Would it facilitate corporate responsibility by making lenders directly bear risk for environmental costs? Or would it result in a dearth of available financing such that companies cannot undertake value-adding projects that employ people? We just do not know: certain aesthetics of commercial law deter engagement with these questions. The UCC denies its ability to entertain such a rule by presenting its consonance with priorities of commercial actors as the basis for its existence and success. The grid aesthetic is a pre-reflective notion that incorporating environmental standards into the UCC is somehow unattractive or cumbersome. The UCC belongs in the commercial law box; laws meant to deal with environmental issues belong in the environmental law box, etc.<sup>96</sup>

The UCC exhibits the grid aesthetic in that it is divided into discrete articles, each dealing with its own subject matter. The Code as a whole deals with commercial law rules, as opposed to any other category of rules. Within the Code, Article 2 governs Sales, Article 3 governs Negotiable Instruments, Article 4 governs Bank Deposits and Collections, Article 5 governs Letters of Credit, and so on. Within these articles one finds further grid-like classifications. Article 9 on Secured Transactions, for example, classifies different kinds of personal property into different, discrete categories of collateral, such as accounts, general intangibles, investment property, and goods. Each has its own rules for perfection.<sup>97</sup>

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debtor defaults under the loan agreement. One requirement for enforceability of a security interest is that the debtor have rights in the collateral. *Id.*

95. Of course, such a revision would raise a host of policy and technical considerations that are not within the scope of this article. This hypothetical reform merely proposes that, in theory, the UCC could incite—through creditor control and restricting access to credit—internalizing costs to third parties.

96. It might be difficult to work environmental law concerns or labor law concerns directly into a commercial code. However, the fact that—as a statutory drafting matter—the boxes of the grid may be necessary does not justify complete disregard of third party effects of the laws at issue. The point here is to illuminate how the grid aesthetic privileges commercial actors by encouraging disregard of third party effects.

97. “Perfection,” in commercial law, is the method by which a secured creditor makes its claim to the debtor’s assets enforceable against other possible claimants.

Article 9 treats “like” collateral alike regardless of how different two pieces of “like” collateral may be in practice. For example, the rules for creating, perfecting, and enforcing a security interest in shares of a corporation are the same regardless of whether the corporation is a special purpose vehicle that does nothing but hold assets or a large, operating entity with many employees and other creditors.

On a macro-level—taking the UCC as a whole—the grid aesthetic enables commercial actors to ignore third party effects of commercial transactions as such effects are deemed the province of some other box in the grid, like labor regulation. The integrity of the grid aesthetic depends upon clear distinctions in subject matter between commercial transactions and other kinds of legal transactions. The very concept of effects of a transaction—as in “third party effects” or “externalities”—is a function of this grid aesthetic. Costs, rights, and liabilities of the lender(s) and debtor(s) that enter into a given secured loan, for example, are handled in the transaction documents and the UCC. Costs, rights, and liabilities incurred by other persons as a result of the same secured loan are “effects” or “externalities” that are typically outside of the purview of the UCC. Effects of commercial transactions on third parties are separated out to maintain the integrity of commercial law as a discrete category on the grid.

The distinction between commercial law and other bodies of law is reinforced by divisions of labor among legal professionals, the boundaries of the other units of the grid into which commercial law is not supposed to extend, and divisions within the curricula for training lawyers. The grids within the UCC, however, prove at points to be difficult to sustain. There is no line separating certain kinds of Sales (Article 2) from Secured Transactions (Article 9), for example.<sup>98</sup> In other words, the wall between commercial law and other fields seems remarkably resilient such that, for example, an effort to limit secured lending to protect third parties from practices that are supposed to be policed by other codes seems politically infeasible. But at the same time, legal and commercial actors commonly recognize the walls of the grid within the commercial law box as fluid and manipulate categories of commercial transactions. In many instances, they do so to externalize costs onto unsophisticated or non-consenting parties.<sup>99</sup>

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98. For example, sales of rights to payment behave economically like secured loans. UCC Article 9 covers these sales. See sources cited *infra* notes 106–08 and accompanying text.

99. For example, financiers will disguise secured loans as leases in order to avoid having their collateral included in a bankruptcy estate such that a

Many types of financing are difficult to categorize as sales or leases or secured loans (including repos). Standing alone, the fact that a financing is difficult to characterize does not mean that it has negative effects on weaker parties. This section considers one type of financing, asset securitization, (1) to show the power of the grid aesthetic in commercial law, and (2) to illustrate how some sophisticated financiers invoke and manipulate the grid, such that (3) the grid aesthetic privileges commercial actors in ways that can produce socially undesirable results. Asset securitizations are among the many kinds of transactions that contain elements of both sales and secured transactions. The practice of securitization shows how the grid aesthetic pervades commercial law and shapes the expectations of commercial actors.

In an asset securitization, a company sells assets to a special purpose vehicle (“SPV”) that it forms for the sole purpose of purchasing assets. The SPV then issues securities or borrows funds secured by assets it purchased from the parent company. The proceeds of the issuance or loan are passed from the SPV to the company in the form of the purchase price that the SPV pays for the assets. The SPV is set up to be bankruptcy remote—meaning it has no creditors (other than the investors providing the financing in the securitization itself) and it is sufficiently separate from the company to avoid consolidation in bankruptcy. This enables the company to raise or borrow funds at a lower rate than it could directly because the SPV has a credit rating that is unmarred by the possibility of bankruptcy or the presence of competing creditors. The company strips assets away from the reach of its general creditors in exchange for cash that it can then apply in a variety of ways.<sup>100</sup>

Securitizations can be challenged by creditors of the company seeking to satisfy claims out of the assets the company shifted to the SPV. The challengers contend that the transfer of assets from the company to the SPV was to secure a loan and not to make a

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bankruptcy trustee might disperse adequate protection (and not the collateral itself) in exercising its power on behalf of general creditors. *See, e.g.,* Am. President Lines, Ltd. v. Lykes Bros. Steamship Co. (*In re* Lykes Bros. Steamship Co.), 196 B.R. 574, 580–85 (Bankr. M.D. Fla. 1996) (setting out a range of factual considerations relevant to determining if an agreement is a true lease or a secured loan).

100. *See* Chase W. Ashley, Comment, *When A Company Securitizes, Its Creditors Face Higher Risks*, AM. BANKER, May 7, 1993, at 4 (contending that the cash an originator receives is unlikely to stay with the company and, therefore, securitization could hurt creditors).

sale such that the company retains an interest in the assets. The transfer of assets from the company to the SPV has some of the elements of assigning collateral for a loan in that the SPV does not always take the full risks of ownership that pass to the buyer in a straight-forward sale to an unrelated third party.

Generally, parties and courts facing a challenge to a securitization look to the “true sale” doctrine to determine whether the asset transfer indicates a sale or a loan. If there is a sale, then creditors of the company cannot recover against the assets transferred to the SPV. If there is a loan, the SPV is a creditor of the company that must comply with UCC Article 9 and participate in any bankruptcy proceedings in order to establish ownership of the assets if the company becomes insolvent.

Some scholars find securitization to be a form of judgment-proofing.<sup>101</sup> Companies can judgment-proof themselves by transferring assets to the SPV and out of the reach of other claimants in exchange for cash that the company can apply as it sees fit.<sup>102</sup>

Legislators, scholars, and practitioners persist in efforts to keep asset securitization separate from the purview of Article 9 secured lending so that challenges by creditors of companies that securitize their assets cannot succeed. Securitization proponents invoke the grid to insist that a clear distinction exists, yet the grid can have trouble holding up. SPVs routinely file UCC-1 financing statements<sup>103</sup> naming the company, or seller, as debtor. Secondary sources continue to treat asset securitization as a cousin of secured

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101. See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 23–30 (1996); Lynn M. LoPucki, *The Irrefutable Logic of Judgment Proofing*, 52 STAN. L. REV. 55, 59–67 (1999). But see Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999). At least some securitizations are inefficient in that they enable companies to transfer costs to third parties in order to fund projects that do not generate enough value to offset these costs. Whether these inefficient securitizations represent a majority of securitizations, or generate costs that are not offset by value created through the practice of securitization generally, is an unanswered empirical question.

102. Though the company receives cash in the form of the purchase price for the assets securitized, the company can apply this cash in a variety of ways that do not benefit general creditors, including disbursement to shareholders. See generally Ashley, *supra* note 100; see also Lois R. Lupica, *Asset Securitization: The Unsecured Creditors' Perspective*, 76 TEX. L. REV. 595 (1998) (observing that the investors in the SPE have no incentive to monitor an originator once the true sales transaction is complete).

103. Lenders file UCC-1 financing statements to perfect security interests in collateral.

lending;<sup>104</sup> asset securitization occupies an important subsection in secured transactions textbooks.<sup>105</sup> UCC Article 9 covers sales of payment intangibles and promissory notes,<sup>106</sup> and includes credit card receivables in its definition of “accounts,”<sup>107</sup> such that the overwhelming majority of securitizations are within the purview of Article 9. The UCC does this in order to avoid the need to distinguish between sales and security transfers of these assets for Article 9 purposes.<sup>108</sup> Whether a transfer of assets is a sale or a loan is a question to be determined by courts assessing the amount of recourse that a buyer has under the contract in question.

The securitization industry has been threatened by the possibility that creditors of companies securitizing assets might successfully challenge these transactions. For example, in *In re LTV Steel, Inc.*,<sup>109</sup> Judge Bodoh issued a preliminary opinion that ordered secured lenders to turn over to the bankrupt LTV Steel cash proceeds of inventory and receivables that LTV Steel had transferred to an SPV in a securitization. The opinion states the following:

[T]here seems to be an element of sophistry to suggest that Debtor [LTV Steel, Inc.] does not retain at least an equitable interest in the property that is subject to the interim order. Debtor's business requires it to purchase, melt, mold and cast various metal products.<sup>110</sup> To suggest that Debtor lacks some ownership interest in products that it creates with its own labor, as well as the proceeds to be derived from that labor, is difficult to accept.<sup>111</sup>

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104. See generally Symposium: *Threats to Secured Lending and Asset Securitization*, 25 CARDOZO L. REV. 1539 *et seq.* (2004).

105. See, e.g., James J. White, SECURED TRANSACTIONS TEACHING MATERIALS (2d ed. 2002).

106. See U.C.C. § 9-109(a)(3) (2001).

107. See *id.* § 9-102(a)(2)(vii).

108. See PEB Commentary No. 14 on Uniform Commercial Code § 9-102(1)(b) (1994) (rejecting the Tenth Circuit Court of Appeals decision in *Octagon Gas Systems, Inc. v. Rimmer*, 955 F.2d 948 (10th Cir. 1993), that the impact of applying Article 9 to the buyer's account is that the account remains property of the bankruptcy estate).

109. 274 B.R. 278, 286–87 (Bankr. N.D. Ohio 2001). This opinion had no practical effect, however, because LTV relinquished its challenge to the securitization shortly after the opinion was issued.

110. LTV Steel had securitized its inventory.

111. *In re LTV Steel, Inc.*, 274 B.R. at 285.

Judge Bodoh rejects the legal fictions that enable securitization in favor of a real-world view of the interests of the parties at issue. It is difficult, as a practical matter, to conceive of a shell entity that exists for the sole purpose of holding assets having a legitimate ownership interest in its parent company's assets sufficient to remove them from the reach of creditors like the employees whose labor created the assets in question.

In response to these threats, lawmakers get out the grid in the form of asset-backed securities ("ABS") statutes. These statutes override the true sale doctrine—and any UCC Article 9 requirements to establish priority as a lender—to state that a sale made in the context of an asset securitization shall be treated as a sale.<sup>112</sup> This is true even if the economic substance of the transaction indicates that perhaps it is better understood as a loan. The ABS statutes put sales in the context of securitization into the sales box. No economic substance or real-world analysis is necessary (or permitted).<sup>113</sup> The fact that lawmakers and securitizers trust in this line-drawing exercise to raise large amounts of capital against assets moved across a line, beyond the reach of general creditors, attests to the power of the grid aesthetic.

The word aesthetic stems from the Greek *aithēsis*, meaning, to perceive. Adding the prefix "an" creates "anesthesia"—blocked perception. The anesthesia of power refers to the blocked sensations, the insensibilities, that permit those in positions of power to inflict pain upon others without sensing or experiencing

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112. See, e.g., ALA. CODE § 35-10A-2(a)(1) (2003); DEL. CODE ANN. tit. 6, §§ 2701A–2703A (2003); LA. REV. STAT. ANN. § 10:9–109(e) (2003); OHIO REV. CODE ANN. § 1109.75 (2003); N.C. GEN. STAT. §§ 53-425, 53-426 (2004); S.D. CODIFIED LAWS § 54-1-10 (2003); TEX. BUS. & COM. CODE ANN. § 9.109(e) (2004).

113. Note that the brokers in *Granite Partners* invoked the grid in order to avoid liability under their repo agreement with several investment funds. If the repo was a sale, then the brokers were free to dispose of the securities as they saw fit. If the repo was a secured loan, then the brokers could only dispose of the securities in compliance with UCC Article 9. Whether the agreement fit into the sale box or the secured loan box of the grid determined the duties and liabilities of the parties. The grid aesthetic enabled the brokers to avoid examination of their underlying intent, which, in the case of *Granite Partners*, would have resulted in greater liability for the brokers. It is beyond the scope of this article to state how repos should be characterized. *Granite Partners* is mentioned here as one example of the grid aesthetic at work, not as a critique of the outcome in this case.



pain themselves.<sup>114</sup> What anesthetics enable commercial actors and lawmakers to disregard negative externalities of commercial activity?

The grid aesthetic can be an anesthetic. By separating out technical commercial law questions from other legal and ethical questions, it excises from view and from feeling a whole range of concerns—for example, concerns about employees or other claimants (like the retirees in *In re LTV Steel, Inc.*<sup>115</sup>) left without recourse because of classification of an asset transfer for securitization as a sale and not a loan. The grid aesthetic permits commercial actors to consider primarily their own interests. The interests of others are not the province of commercial law.

### C. The Instrumentalist Aesthetic

The close association of the UCC with legal realism indicates the prevalence of an instrumentalist aesthetic in commercial law. The UCC—both in its inception and in the revisions of its various articles—is widely recognized as an expression of legal realism<sup>116</sup> and realist tendencies.<sup>117</sup> Of course, this is not to imply that

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114. See Mab Segrest, *The Souls of White Folks*, in *THE MAKING AND UNMAKING OF WHITENESS* 43 (Birgit Brander Rasmussen et al. eds., 2001) (discussing the anesthesia of slavery).

115. See sources cited *supra* notes 109–11 and accompanying text.

116. For a definition of legal realism, see sources cited *supra* notes 81–82 and accompanying text.

117. See, e.g., William Twining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (Univ. of Okla. Press 1985) (1973); Carl S. Bjerre, *Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305, 314 (1999) (referencing “that great Realist project, the Uniform Commercial Code”); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995) (stating that the legal realist movement led to the eventual drafting of the UCC); Lance Liebman, *The ALI and the UCC*, 52 HASTINGS L.J. 645, 648 (2001) (describing the UCC as “a modernist and a Realist document”); Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365 (2005); Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 544 (2000) (stating that “the U.C.C. has long been regarded as the apogee of the Legal Realists’ practical accomplishments”); Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173 (2000);

scholars regard the Code as lacking formalist elements.<sup>118</sup> Rather, the critique in this section is based upon dominant understandings of the Code, which cast and celebrate the UCC as specifically realist.<sup>119</sup>

Annelise Riles observes that “the principal insight of Realism was that law was best imagined metaphorically as a tool, and that the lawyer and legal theorist was best imagined metaphorically also as if he were a techno-scientist.”<sup>120</sup> Karl Llewellyn, an original architect of the UCC, analogizes legal rules to tools and materials for building; he describes the “exciting parallel between rules-structure and physical building.”<sup>121</sup> The “worded rule” is a “technical device” for building rule-structures.<sup>122</sup> Further emphasizing the tool metaphor, he notes that “someone at the Contracts Round Table at the American Association of Law Schools in 1941 likened the invention of transferability of contract-rights, notably credits, to the invention of the wheel . . . .”<sup>123</sup>

The law as tool metaphor employs an instrumentalist aesthetic in which law has the properties of a physical object.<sup>124</sup> It can be picked up and used to accomplish the goals of multiple, diverse legal actors. This aesthetic imagines law as having a utility that can be put to various ends. The instrumentalist universe emphasizes infinite practical possibilities. The notion that law is a tool implies that law has a utility detached from any particular cultural or ideological commitments. The extent to which the form of the tool limits the range of ends to which it can be put tends to escape notice.

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William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329 (1985) (analyzing the relationship between the UCC and realist jurisprudence).

118. See, e.g., Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Bridge et al., *supra* note 67; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971 (2001).

119. Note that the relationship between the UCC and its American realist pedigree is especially important to explore as U.S. commercial law models are exported to civil law jurisdictions without the same jurisprudential history.

120. Riles, *supra* note 7, at 980.

121. Llewellyn, *supra* note 14, at 233.

122. *Id.*

123. *Id.* at 233 n.5.

124. For a discussion of Schlag's approach to objectivist (and correlative subjectivist) legal aesthetics, see Schlag, *THE ENCHANTMENT*, *supra* note 7, at 98–111.

Riles offers the following insight about legal realism and the tool metaphor: "In mid-century Conflicts . . . the idea that law was like a tool quite literally became a tool of its own . . . . In other words, . . . metaphorical use of techno science in legal theory was literalized; it became reality."<sup>125</sup> Further, she asserts, "this actualization, or mechanization of Realist metaphors as a kind of 'aesthetic practice' has proven far more durable than the ideology of Realism itself."<sup>126</sup> In other words, regardless of the current state of legal realism as movement, the practice of viewing law as a tool for achieving various ends remains highly salient as an instrumentalist aesthetic practice.

Riles develops her thesis in the context of conflict of laws. But this double-layered description—law as tool (a practical approach) and the idea that law is a tool as a tool in its own right (a situs of ideological intervention)—might be applied in a wide range of areas of law. Contemporary understandings of commercial law bear out Riles's observation. The idea that commercial law is a tool has become a tool of its own. The image of commercial law as a tool for spurring economic growth is itself a tool that advocates can use to advance law reforms that further neo-liberal policies.<sup>127</sup>

The law and development movement of the 1960s came to a halt when its leading protagonists realized how little they knew about how and when law and legal institutions matter for socio-economic development.<sup>128</sup> Despite this earlier movement's demise, the notion that law reform not only matters but is crucial for development has re-emerged in the form of a new law and development consensus.<sup>129</sup> The consensus holds that once law-receiving countries adopt certain legal norms and forms of law that encourage investment, economic development and growth will

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125. Riles, *supra* note 7, at 981.

126. *Id.* at 1009.

127. Neo-liberalism is an economic doctrine based on the concepts of open competitive markets, of determining prices by supply and demand (and not government intervention), and of free trade or the absence of barriers to participation in markets. It regards wealth maximization through investment by individuals and private entities as the best way to increase collective welfare. See Susan George, *ANOTHER WORLD IS POSSIBLE IF . . .* 8 (2004).

128. See Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 102 (2003).

129. For a current, critical examination of law and development movements, see generally *THE NEW LAW AND ECONOMIC DEVELOPMENT* (David M. Trubeck & Alvaro Santos eds., 2006).

follow. In the field of commercial law, reform of personal property collateral security rules sits high on the list of laws that, once reformed, will spur development.<sup>130</sup>

However, Tamara Lothian and Katharina Pistor have found that experiences of practitioners involved in foreign investment projects and of countries such as Argentina result in “confusion over the appropriate content and scope of market-oriented reform, including the reform of legal institutions that are commonly associated with markets.”<sup>131</sup> They write:

There is no direct correlation between foreign direct investment and the kinds of detailed legal arrangements that comprise a contemporary system of corporate or financial law. Instead, the question must be approached . . . through the examination of particular kinds of investment projects, the interests they raise, and the variety of legal forms and regulatory approaches available to support them . . . . For example, a neo-liberal program of privatization<sup>132</sup> will require one set of legal reforms, while a commitment

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130. As Lothian and Pistor acknowledge, there is more empirical evidence today that law matters for development. See Lothian & Pistor, *supra* note 128, at 103. Legal scholars and economists regard secured lending in particular as crucial for economic growth. See *Meeting of OAS-CIDIP-VI Drafting Committee on Secured Transactions, Conference Transcript*, 18 ARIZ. J. INT’L & COMP. L. 311, 334 (2001) [hereinafter *Meeting of OAS-CIDIP-VI Drafting Committee*] (referencing studies by the World Bank concluding that a country with access to secured lending can raise its GDP by ten percent or more). Note, however, that increased GDP may indicate economic activity that does not necessarily further a desired range of development goals.

131. Lothian & Pistor, *supra* note 128, at 105.

132. Privatization involves the sale or concession by a government of assets for private ownership and operation. Scores of water systems and utilities have been privatized throughout the developing world. See generally World Bank Privatization Database, available at <http://rru.worldbank.org/Privatization/>. A project lender provides financing to private investors to enable them to purchase assets from the government and make capital investments or improve infrastructure. The project financing is structured such that the lender expects to be repaid from the proceeds of the project—the water or utility bills—over the term of the loan. The investors are attempting to improve infrastructure and then recover their investment and make profits from the use of the infrastructure by the local population over time.

to a more radically democratic form of market economy will require a different approach.<sup>133</sup>

Despite the emergence of a new consensus on law and development (championed by the World Bank, the IMF, and the United States Agency for International Development), it is not clear that certain forms of legal protections for investors are synonymous with development.<sup>134</sup>

While experiences of practitioners and of various nations call this law and development consensus into question, scholars present U.S.-style commercial law as a tool for economic growth. Lothian and Pistor find that generalizations about law and development are “of limited use,”<sup>135</sup> yet generalized faith in the utility of U.S.-style commercial law persists. For example, Steven L. Schwarcz, Bruce Markell,<sup>136</sup> and Lissa Lamkin Broome write:

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133. Lothian & Pistor, *supra* note 128, at 110. A neo-liberal program of privatization would involve, among other things, reforms (1) to permit private investors to acquire controlling shares of a project entity that owns the assets being privatized, and (2) to create collateral security rules that grant a project lender a first priority and full priority position in all present and future assets of the project entity. These kinds of reforms might maximize the amount of funding available for the project. However, they are also associated with loss of local control of assets of collective importance and potential for exclusion of the poor from vital services due to the private investors’ control over rates (which are set to service the project lender’s debt). In other words, it is possible that the ultimate beneficiaries of such reform could be foreign investors who profit at the expense of local communities. A more radically democratic form of market economy, on the other hand, might involve reforms that contain many of the features of UCC Article 9 but decline to give secured lenders full priority in advance of claims by workers for pensions or wages, for example. It may reserve some percentage of a debtor’s assets for certain classes of unsecured creditors or it may rank certain unsecured creditors *pari passu* with perfected secured creditors.

134. Lothian and Pistor cite the facts that Argentina suffered financial crisis despite following every precept of the new consensus and that some countries that have not undergone the prescribed legal reforms, like China, Vietnam, and India, have demonstrated impressive economic growth. *Id.* at 111–12.

135. *Id.* at 121.

136. Note that Markell offers his own “view from the field” on the efficacy of law reform for development. He asserts that the lack of rules like those in the UN Convention on Assignment of Receivables in Indonesia resulted in significant costs to a financier of motorcycles that securitized its rights to payment. See Bruce Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rules of Law*, 6 IND. J. GLOBAL LEGAL STUD. 497, 504–05 (1999). Markell’s conclusions on the

Standardization of commercial law across borders through the law merchant brings more certainty to trans-border transactions, which helps increase cross-border economic activity that benefits the economies involved. Such standardization often requires many countries, particularly developing ones, to engage in commercial law reform. Often the IMF and World Bank encourage countries to engage in such legal reforms.<sup>137</sup>

The authors imply that commercial law reform (towards models such as the UCC) is a practical strategy for economic growth. Commercial law as codified by the UCC is a tool that nations can use to increase economic activity that will benefit their economies.

But consider (1) the diversity of actual experiences and goals surrounding law reform and economic growth, and (2) the way in which full priority secured lending and asset securitization, for example, can favor investors' interests to the potential detriment of third parties.<sup>138</sup> These factors suggest that, in some scenarios, the idea that commercial law is a useful tool for economic growth is itself a tool that can be used to benefit investors at the expense of peoples of developing nations.<sup>139</sup>

To elaborate, a UCC Article 9-style set of collateral security rules would, in most contexts, increase businesses' access to credit. This increased access to credit, however, may (1) require

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need for reform and the value of laws that would facilitate securitization in Indonesia may be completely correct. Lothian and Pistor's point is that it is not clear from Indonesia's experience that adopting a certain set of prescribed rules will spur growth everywhere. Lothian & Pistor, *supra* note 128, at 106 n.13.

137. Steven L. Schwarcz et al., *SECURITIZATION, STRUCTURED FINANCE, AND CAPITAL MARKETS* 172 (2004). Specifically, they describe the UNCITRAL's Convention on Assignment of Receivables as a reform that, where adopted, "should provide sufficient certainty to allow expansion of securitization . . . which in turn will enable the Convention to achieve its aims of making more credit available at lower prices to all economies." *Id.* at 195. The authors view the Convention as a tool or object that, once acquired, will enable increased credit. See also Spiro Bazinas, *An International Regime for Receivables Financing: UNCITRAL's Contribution*, 8 *DUKE J. COMP. & INT'L L.* 315, 325–27 (1998).

138. See sources cited *supra* notes 84–89, 100–11 and accompanying text.

139. Perhaps Schwarcz, Markell, and Broome do not themselves intend to use this idea of commercial law as a tool in this way. However, their uncritical reference to IMF and World Bank law reform initiatives raises the question.

relinquishment of local control over assets that are important to a community,<sup>140</sup> or (2) create burdensome debt that a company may service by using exploitative labor practices, for example. These types of negative externalities that full priority secured lending can create harm local interests and benefit investors who collect on the loan and have a priority position in their debtors' assets in the event that debtors become unable to pay.

The findings of Lothian and Pistor, coupled with scholars' assertions that U.S.-style commercial law is a universally desirable tool for increasing economic activity, suggest that, regardless of the actual efficacy of commercial law reform for bringing about beneficial forms of development, viewing commercial law as a tool is a powerful instrumentalist aesthetic practice. The instrumentalist aesthetic privileges commercial actors in that it enables investors to regard as tools—as practical devices capable of a range of ends—forms of law that yield controversial distributive consequences favorable to them.

### III. THE SUBLIME AND THE UCC

*[T]he legal structure of secured credit developed to make possible the mass production and the distribution of goods . . . . [T]hese developments have increased human welfare.*

—Homer Kripke<sup>141</sup>

*In a single recent year the United States generated 270 million scrap tires . . . . Pollution oozes from them and fires are common.*

—Dolores Hayden<sup>142</sup>

The term sublime has a colloquial meaning—basically, it means so impressive as to inspire awe. Sublime also has more specialized meanings developed in philosophy.<sup>143</sup> These more specialized meanings have attempted to address how it is that we

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140. See sources cited *supra* note 86 and accompanying text on secured creditor control. See also Ronald C.C. Cuming, *Recognition of Security Interest in Mobile Equipment: An International Approach*, in COMMERCIAL AND CONSUMER LAW, *supra* note 69, at 103–04.

141. Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 931 (1985).

142. Hayden, *supra* note 3, at 104.

143. The concept of sublimity features prominently in Immanuel Kant's work on aesthetics. See generally Immanuel Kant, *CRITIQUE OF JUDGMENT* (Werner S. Pluhar trans., Hackett Pub. Co. 1987) (1790).

can experience pleasure from things that are frightening, things that are menacing.<sup>144</sup> The sublime indicates feelings of horror and respect, such as in response to violent forces of nature.

Sublimity is an experience, a human response. It is the experience of feeling pleasure and fear at the same time in the face of something much larger than ourselves. The energy and grid aesthetics contribute to a sense of sublimity surrounding commerce and commercial law. This sense of sublimity fuels dominant views of (1) the UCC as facilitating a glorious, unstoppable capitalist machine, and (2) constant expansion of commercial activity as naturalized or a force of nature.<sup>145</sup>

Homer Kripke observed that UCC Article 9 has enabled the mass production and distribution of goods. He is not the only architect of the UCC to cast its purpose and effects in grandiose terms. James J. White and Robert S. Summers write that “in its early days, the [UCC] was put forward as the grandest achievement of all time in the history of private statute law making.”<sup>146</sup> They report an ethos of “Uniform Commercial Code Romanticism” surrounding the Code’s development.<sup>147</sup> This ethos “continues to prevail today in many quarters.”<sup>148</sup>

This ethos is corroborated by a sense of perpetually escalating levels of commercial activity facilitated by commercial law. Boris Kozolchyk, for example, references an “ever-increasing demand for credit at reasonable rates of interest”<sup>149</sup> in advocating for creation of a UCC Article 9-style uniform law for Mexico and other Latin American states.

Contemporary commercial activity is menacing in both volume and quality. We are aware of the painful reality that many workers grow old to find their pensions unfunded when their prior employer becomes insolvent. We are aware of environmental ruin. Yet, commercial laws that facilitate these results receive

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144. This concept raises a host of moral questions that are beyond the scope of this article. For example, what is the relationship between the sublime and the good? Does the sublime lead people to conflate a sense of spiritual elevation with actual spiritual elevation? See generally A COMPANION TO AESTHETICS, *supra* note 23, at 407–11.

145. Note that (1) and (2) here reference Kant’s distinction between the mathematically sublime—the absolutely large—and the dynamically sublime—the fearsome unstoppable force of nature or power. See Kant, *supra* note 143, at lxix–lxx.

146. White & Summers, *supra* note 1, at 21.

147. See *id.* at 21–22.

148. *Id.* at 21.

149. Meeting of OAS-CIDIP-VI Drafting Committee, *supra* note 130, at 335.



adulation—even awe-struck admiration.<sup>150</sup> UCC Article 9, in particular, is called “genius.”<sup>151</sup> Superlative praise of the UCC and of the UCC’s adeptness at facilitating commercial activity, coupled with the menacing aspects of this activity, indicate that sublimity is at play surrounding commercial activity and law.

Immanuel Kant describes sublimity in relation to nature: its vastness or the mathematically sublime, and its power or the dynamically sublime.<sup>152</sup> Sketched briefly, in terms of the mathematically sublime, we experience displeasure and disempowerment in the face of vastness because no apprehension is adequate to the idea of the infinite. But the ability to think of that which is great beyond all comparison must mean that we have special ability in which we take pleasure.<sup>153</sup> We experience pleasure because through conflict we are made aware of the power of our reason to direct sensibility and judgment.<sup>154</sup> In terms of the dynamically sublime, we experience fear or displeasure in the face of extremely powerful or menacing forces because we realize the inadequacy of our physical powers of resistance. But, at the same time, we come to realize the ability through reason to direct sensible faculties not to fear in fearful circumstances.<sup>155</sup> We take pleasure in this extraordinary ability.

We can conceive of sublimity in the context of commercial law like this:<sup>156</sup> The colossal power of market forces and the prospect of unending, unsustainable development are fearful; they cause displeasure and a feeling of hopelessness. But, at the same time, realization of the ability through work and acquiescence to gain a share of wealth and the hope for collective wealth that will eliminate poverty is pleasurable, is attractive.

The UCC is scary and it is spectacular. By encouraging as much access to credit as possible, the UCC creates horrifying potential for environmental destruction. But, simultaneously, it

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150. See, e.g., White & Summers, *supra* note 1, at 4.

151. Ronald C.C. Cuming, *Article 9 North of 49: The Canadian PPS Acts and the Quebec Civil Code*, 29 LOY. L.A. L. REV. 971, 989 (1996).

152. See Kant, *supra* note 143, at 119–23.

153. See Donald W. Crawford, *Kant*, in THE ROUTLEDGE COMPANION TO AESTHETICS 55, 62–64 (Berys Gaut & Dominic McIver Lopes eds., 2d ed. 2005) (describing Kant’s “Analytic of the Sublime” chapter of *Critique of Judgment*).

154. *Id.*

155. *Id.*

156. This presentation of sublimity in the commercial context is not intended as an application of Kant’s theory of the sublime. The basic sketch of Kant’s approach offered above merely offers a structure for describing sublimity in the commercial context.

enables the prospect of spectacular wealth that could alleviate poverty and yield riches.

Securitization is a multi-trillion dollar industry. Securitization moves unfathomable amounts of assets into bankruptcy remote corporate shells and out of the hands of normal operating entities and the reach of creditors like employees or judgment holders.<sup>157</sup> This contributes to the sense of sublimity surrounding commercial activity because the fact that corporations securitize their rights to payment drives corporate incentives towards uniformity of dealings with customers and maintenance of a clear allocation of rights and remedies that heavily favors the corporation's interests. As an individual, bargaining with a large vendor for specific terms in contracts for goods or loans is virtually impossible. The vendors not only have advantages in size and sophistication. They also, in many instances, have committed their contracts with customers to securitization facilities such that the company's expected cost of funds depends upon uniformity of the terms of the contracts pooled and securitized and the predictability of the pool's default rate.

In other words, commercial law's unabashed encouragement of securitization<sup>158</sup> fuels individuals' feelings of powerlessness and lack of agency in dealing with many corporate vendors. Sticking to the form of mortgage agreement approved by investors that purchase securities that are collateralized by certain mortgages is far more valuable and efficient to a mortgage lender than pleasing or retaining any one customer, no matter how loyal.

The same goes for large vendors of goods who sell on credit, bill customers with invoices, or lease their inventory such that their contracts with customers may be securitized. Manufacturers of goods that have securitized their rights to payment have strong incentive to use the contract formation and warranty disclaimer rules in UCC Article 2 to ensure that customers can only return goods or claim breach of warranty in very limited, prescribed circumstances. In a securitization context, it seems, no individual customer is as valuable as uniformity of customer contracts and a low rate of refunds.

At the same time, consumers take pleasure in goods made affordable by structured financing. For most in the United States and many elsewhere, the pleasures of participation in markets for goods instrumental in individual well-being, recreation, identity construction, reward, and the like co-exist with the menacing aspects of large-scale commercial activity.

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157. See sources cited *supra* notes 100–11 and accompanying text.

158. See sources cited *supra* notes 111–12 and accompanying text.

Sublimity in terms of potential for environmental destruction, coupled with capitalistic behavior that is celebrated and naturalized, characterizes contemporary real estate markets. Issuances of asset-backed securities generate capital that home mortgage lenders use to expand lending programs. These programs encourage inflation in housing markets, producing bubbles of wealth that benefit some who can participate in the market and that exclude others from participation all together. These issuances proliferate in response to continuing development of industry form commercial contracts<sup>159</sup> and recent legal developments like the ABS statutes and revisions to UCC Articles 8 and 9.

Along with these innovations in financing, new houses grow larger every decade. They averaged around 800 square feet in the 1950s; in 2000, this average had grown to around 2,200 square feet despite shrinking household sizes.<sup>160</sup> People take pleasure in occupying larger and larger homes despite fears of environmental devastation.

The energy aesthetic in commercial law<sup>161</sup> contributes to the sense of sublimity surrounding this law. Energy is a force of nature (often associated with the sublime). Commercial law as energy responding to the forward-moving energy of increasing market activity and innovation naturalizes commercial law developments. The experience of commercial law as energy in service of commercial activity and of commercial activity as invoking the sublime magnifies and exaggerates this law. U.S. commercial law seems to stand colossal and naturalized in the face of dissenters concerned with environmental consequences, alternative views of property,<sup>162</sup> or labor exploitation.

The grid aesthetic encourages a feeling that commercial law is necessarily myopic. The UCC facilitates the commercial transactions that drive the progression of capital. That is its purpose.

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159. These are standardized forms of agreements developed by industry groups. These forms tend to favor heavily the institutional or industry party to the contract. These forms are very difficult to negotiate. Negotiated deviations from the forms usually only occur in contracts involving very large dollar amounts.

160. Hayden, *supra* note 3, at 110.

161. See discussion *supra* Part II.A.

162. See, e.g., Mary E. Hiscock, *Law and Political Change: Land Use by Foreigners in Socialist Countries of the Third World*, in COMMERCIAL AND CONSUMER LAW, *supra* note 69, at 292 (discussing clash between Western collateral security rules and aboriginal conceptions of land).

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participants. While, of course, many of the rules formulated by this small group of drafters are drawn from commercial law's long history, others, like the full priority floating lien, gained effect with the UCC.

The relationship between commercial law, commercial activity, and the sublime constitutes a warning to both domestic and international legal actors.<sup>168</sup> This relationship complicates efforts to cut commercial law down to size and consider the possible value of legal limitations on commercial actors.

#### IV. CONSEQUENCES OF AESTHETICS OF COMMERCIAL LAW

##### A. *Common Refrains Against Reform*

Efforts to cut the UCC down to size and create effective limitations on commercial activity are met with some well-worn refrains. One such refrain is: Any reduction in commercial activity will most harm labor and the poor. Specifically, for example, when commentators propose limits to UCC Article 9's full priority structure—to create an equity carve-out<sup>169</sup> or establish priority for tort claimants<sup>170</sup>—they tend to meet debate-stopping assertions that any such limits will result in credit constriction.<sup>171</sup> Credit constriction will, in turn, harm businesses and reduce commercial activity. Businesses must have as much access to credit as

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168. Ugo Mattei proposes that “one may argue that the only way to create an efficient setting for the global market is to develop a thorough and efficient global system of control of externalities, something that requires mighty, proactive institutions in order to be at all efficient.” Mattei, *supra* note 2, at 436. Yet, Mattei finds that just the opposite types of institutions—ones that encourage externalities—seize and maintain power because of their “spectacular appeal.” *Id.* Mattei draws on Gui DeBord's conception of the spectacular, or the spectacle society, to explain the persistence of inefficient institutional models like U.S. laws that encourage market actors to seek short-term benefits with no externality controls. *Id.* at 435–41. The idea of spectacular society is intimately connected to aesthetics.

169. See source cited *supra* note 93 and accompanying text.

170. See LoPucki, *supra* note 84, at 1896–99, 1907–14.

171. For a critique of the political infeasibility of such proposals, see Heather Lauren Hughes, *Creditors' Imagined Communities and the Unfettered Expansion of Secured Lending*, 83 DENV. U. L. REV. 425 (2005) (arguing that a lack of critical discourse on business financing practices creates a political efficiency to full priority secured lending and asset securitization that overrides questions of fairness and of economic efficiency).

possible, the refrain goes, and the law must facilitate that, or else the working people will be the first to suffer.<sup>172</sup>

Elizabeth Warren has asserted that this refrain is untested and unfounded.<sup>173</sup> It remains powerful and often repeated nonetheless both in domestic debates over the UCC and in debates over commercial law reform abroad.<sup>174</sup>

This refrain presents an empirical question that is unanswered and a threat by investors that is untested. It represents a form of “common sense” that is perpetuated by pre-reflective aesthetic proclivities embedded in U.S. commercial law. Put crudely, the idea that limiting or reducing commercial activity—such as secured lending—is unthinkable because the costs of such reduction will fall hardest upon those most in need assumes that these costs are greater than, for example: (1) personal and economic costs of relying upon a company that ultimately may not be able to pay wage or benefit claims; and (2) environmental costs of unfettered commercial activity that disproportionately affect poor communities.

The aesthetics of commercial law discourage consideration of these assumptions. The energy aesthetic encourages a view of commercial law as evolving in response (and subservience) to market needs. Boggling commercial activity down with value judgments or holistic costs analyses offends this aesthetic. Commercial activity is a force of nature with a momentum and trajectory that precedes legal control. Commercial law viewed as energy responding to the energy of commercial activity focuses on removing impediments to generating profits—on minimizing friction so that business activity moves forward smoothly. Any friction will dampen the flow of capital, reducing the amounts available to pass through to workers.

The grid aesthetic discourages consideration of personal costs or broader social or environmental costs of commercial transactions altogether. The grid aesthetic encourages acceptance

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172. See, e.g., Steven Harris & Charles Mooney, *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349, 1371 (1997) (stating that “small businesses (and, accordingly, minority-owned businesses) would disproportionately” suffer from credit constriction if full priority rules were reformed).

173. See Warren, *supra* note 84, at 1378–79.

174. See, e.g., *Meeting of OAS-CIDIP-VI Drafting Committee*, *supra* note 130, at 453–63 (participants voice concerns about absolute priority and are met, in several instances, with statements of the necessity of full priority for cheapening access to credit).

of common refrains against reform by focusing the range of pertinent costs to those of specific commercial actors, viewed individually or collectively. Environmental or social considerations are not part of the analysis of desirable formulations of commercial law.

### *B. The Export of U.S. Commercial Law Models*

This work on aesthetics is a challenge to the commercial law community to more thoroughly engage difficult questions about ideal forms of commercial activity. This challenge is especially important as facets of the UCC model are exported to the developing world. U.S. commercial law is exported in at least two ways: (1) by countries adopting U.S.-style commercial law rules (often to facilitate participation in global capital markets);<sup>175</sup> and

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175. See, e.g., Cuming, *supra* note 151, at 971, 974–77 (discussing the influence of the UCC in Canada); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 277 (1999) (citing the potential costs of isolation and correlative attractiveness of U.S. legal models that facilitate access to U.S. capital and markets); Anthony J. Duggan, *UCC Influences on the Development of Australian Commercial Law*, 29 LOY. L.A. L. REV. 991, 1004–08 (1996) (discussing the influence of the UCC in Australia); John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT’L & COMP. L.Q. 641, 643 (2002) (observing that the World Bank and IMF often condition loan agreements to developing countries in Asia on enactment of Western commercial law models); Gunanto, *supra* note 8, at 1051–56 (discussing the influence of U.S. commercial law in Indonesia); Horacio E. Gutiérrez-Machado, *The Personal Property Secured Financing System of Venezuela: A Comparative Study and the Case for Harmonization*, 30 U. MIAMI INTER-AM. L. REV. 343, 346–47 (1999) (arguing for law reform in Venezuela to create collateral security rules modeled on UCC Article 9); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521, 527 (2004) (describing conditionality of IMF loans); Markell, *supra* note 136, at 501 (reporting that many countries are asked to adopt Western-style commercial laws as a condition to receiving aid from the IMF or World Bank); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 847 (2003) (finding that many countries adopt financial laws from the United States because of demand of investors for legislation similar to that of the United States).

Note that a country may adopt “transplant” commercial laws based on U.S. models for a variety of reasons. This article repeatedly references the theme of the externally dictated transplant—a legal model adopted as a

(2) by serving as a model in international convention drafting projects.<sup>176</sup> U.S. commercial law, as an aesthetic construct, is complicit in perpetuating imperial law, meaning, a dominant layer of world legal systems that is permeated by a legal consciousness steeped in deference to market actors.

A wide range of scholars and other legal actors frequently bill U.S. commercial law models on the international scene simply as pragmatic successes at generating certain types of capital and economic growth.<sup>177</sup> Many commentators present reforms in which foreign jurisdictions adopt laws, for example, of collateral security that track Article 9 of the UCC as reforms that make sense from an economic development standpoint regardless of social or cultural values.<sup>178</sup> Yet, other scholars question the value of using U.S. commercial models in other nations with diverse values and

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condition to doing business with international investors and lenders. However, countries adopt laws based on foreign models for a range of reasons, including saving the costs of drafting new laws, furthering the agenda of particular groups within the country, and generating legitimacy for the country's laws. *See* Miller, *supra*, at 885 (presenting a typology of transplants based on different reasons for their adoption); *see also* Yves Dezalay & Bryant G. Garth, *INTERNATIONALIZATION OF THE PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICA* (William M. O'Barr & John M. Conley eds., 2002).

176. *See, e.g.*, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS Art. 1.7 (1995) (enacting principles that mirror U.C.C. §§ 1-203, 1-201, and 2-203 regarding good faith and fair dealing); Bridge et al., *supra* note 67, at 570 (finding that "the Article 9 model is proving to be influential in the drafting of international conventions on security on movables"); Bradley Crawford, *International Credit Transfers: The Influence of Article 4A on the Model Law*, 19 CAN. BUS. L.J. 166 (1991) (discussing the heavy influence of UCC Article 4A on UNCITRAL's model law for credit transfers).

177. *See, e.g.*, Kevin Davis & Michael J. Trebilcock, *What Role Do Legal Institutions Play in Development?* 51-54 (Oct. 20, 1999) (unpublished draft prepared for the International Monetary Fund's Conference on Second Generation Reforms, Nov. 8-9, 1999), *available at* <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf> (reporting that studies have found that countries that give a high priority to creditors receiving the full present value of their claims have higher rates of economic growth than others, but noting a dearth of research on the relationships between the form of commercial law and non-economic development indicia).

178. *See, e.g.*, Cuming, *supra* note 151, at 989 (stating that "the genius of Article 9 lies in the fact that it reflects the needs of modern business financing and, as such, its basic concepts are universal").



divergent legal traditions.<sup>179</sup> For example, Bruce Markell asks: “Should global capital markets, and the commercial law reform efforts they spawn, force Western-style rule of law notions on non-Western societies?”<sup>180</sup> Their critiques stem from concerns for self-determination and legal pluralism, and from skepticism about how the wealth generated through globalization is distributed and applied.<sup>181</sup>

Facilitating investment and access to credit in developing economies is an extremely important goal. To the extent that aspects of U.S. commercial law models can in fact enable fair and efficient increased commercial activity, they are important models for international legal actors to consider. However, the extent and nature of commercial activity that U.S. commercial law has spawned raise serious fairness,<sup>182</sup> efficiency,<sup>183</sup> and ethical

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179. See, e.g., Carl S. Bjerre, *Project Finance, Securitization and Consensuality*, 12 DUKE J. COMP. & INT’L L. 411 (2002) (arguing that negative externalities of international project financing make it disingenuous to call such transactions consensual); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998) (observing that marketization and democratization can conflict in nations where an ethnic minority elite reaps the benefits of marketization); Mattei, *supra* note 2.

180. Markell, *supra* note 136, at 510.

181. This debate is driven, generally, on the one hand, by proponents of globalization encouraging international law reform and rule of law projects in developing nations that are premised upon the adoption of laws that facilitate foreign investment to the greatest possible extent. Commercial law as conceived and implemented in the United States is an effective set of such laws. On the other hand, global justice activists, legal scholars who doubt U.S. commercial law’s compatibility with social justice, and others, question the export of the U.S. model on grounds that it is an imposition of a foreign model on developing nations.

182. See sources cited *supra* notes 84, 179–80 and accompanying text. Boris Kozolchyk has written about the importance of fairness in commercial transactions and of fair outcomes as an essential function of law when facilitating economic development. See Boris Kozolchyk, *EL DERECHO COMERICO ANTE EL LIBRE COMERCIAL Y EL DESARROLLO ECONOMICO* (1996). He writes of differing standards of fairness in different types of markets. *Id.* The concept of fairness in commercial transactions should extend to third parties affected by transactions and to the environment. In some contexts, third parties have successfully established themselves as parties to whom commercial transactions must be fair in order to succeed. Such contexts include, for example, privatization of water facilities where community water rights, rates, and access are affected by the privatization.

183. See sources cited *supra* notes 3, 85, 88 and accompanying text.

questions.<sup>184</sup> Aesthetics of commercial law inform the context in which we take up these questions.

### 1. *One Theory of Imperial Law*

Comparative law scholar Ugo Mattei's theory of Americanized imperial law offers a provocative reading of the export of U.S. legal concepts and models. Mattei describes a dominant layer of world legal systems permeated by a hegemonic, American legal consciousness.<sup>185</sup> This dominant layer—the imperial law—coexists with a layer of local legal culture in foreign jurisdictions that are cast in contrast to imperial law as parochial and obsolete. Mattei's theory provides one possible lens through which to read this critique of the aesthetics of commercial law to consider consequences of exporting the UCC model.<sup>186</sup>

A range of scholars have recognized a sense of dualism in law in the developing world. For example, the notion of a gap between law on the books and rules of society in Latin American legal culture references this sense of dualism.<sup>187</sup> This image of dualism can be described as imperial in that it is used to further reform agendas in which legal actors in Latin America abandon local, state law in favor of foreign models or society-based, "extra-legal" sources of norms.<sup>188</sup> In other words, the gap idea represents dualism. This

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184. See discussion *supra* Part III.

185. See Mattei, *supra* note 2, at 384. This work does not necessarily corroborate Mattei's designation of imperial law as hegemonic or as American. Mattei finds this legal consciousness to be hegemonic in that it is furthered through constructions of consent. *Id.* at 385–86. He finds constructed consent to domination to be a key element of hegemony. *Id.* at 383. This article will not take up the extent to which imperial law is hegemonic. Its purpose is to present imperial law as a site for understanding potential consequences of the aesthetics of commercial law. On Mattei's designation of this legal consciousness as American, see discussion *infra* notes 196–200.

186. This article does not intend a full excavation or critique of Mattei's view. Rather, it presents his theory of imperial law as a context in which to consider the aesthetics of U.S. commercial law.

187. See, e.g., M.C. Mirow, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 238 (referencing *El Derecho y el Hecho* in the history of Latin American legal cultures); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 53–54 (2003) (critiquing the idea of this gap as a pernicious legacy of the law and development movement).

188. See Esquirol, *supra* note 187, at 102–03.

dualism becomes imperial in light of how it is deployed in contemporary understandings of Latin American law.<sup>189</sup>

Mattei describes an imperial dualism in which local law (such as Latin American<sup>190</sup> law) exists on one level as parochial, highly localized, formalistic, obsolete, and protective of illegitimate elites.<sup>191</sup> On another level exists imperial law, represented by international law and rule of law projects emphasizing technical developments, legal realist tendencies, pragmatist approaches, and deference to market actors. This dualism is perpetuated by images of U.S. commercial law as a pragmatic, culturally adaptable, technically superior tool for generating wealth.<sup>192</sup>

Mattei understands contemporary imperial law as specifically American. He states that the “puzzle approached in [his] article [is] the relationship between the American and the imperial model.”<sup>193</sup> He responds to this puzzle by assessing American influence in legal scholarship, case law, and codification.<sup>194</sup> He finds sufficient influence in these areas outside the United States to designate imperial law American, or dominated by an American legal

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189. Esquirol rejects the idea that the gap actually exists in Latin America (at least to any greater extent than it exists elsewhere). *Id.* at 83–84, 96–97. His work resists imperial dualism in that it (1) presents the gap as a fictitious holdover from the failed law and development movement, and (2) urges legal actors to reject inaccurate conceptions of the possibilities for state and law-centered reform that the image of the gap perpetuates. *Id.*

190. This term is controversial in that it suggests a common legal system or common characteristics across legal systems of the various nations in Latin America. This article does not intend any such suggestion. It uses this term to reference the historical fact of this category of law. *See id.* at 47 n.4. This historical fact is relevant to the nature of the imperial law and dualism described in this Part.

191. *See* Mattei, *supra* note 2, at 444–45. The Americanized imperial law that Mattei discusses arises in the late twentieth century. But the existence of imperial law is by no means just a contemporary phenomenon. For example, Duncan Kennedy observes that, in the late nineteenth and early twentieth centuries, “the Great Powers forced ‘opening’ to Western law, as a mandatory aspect of opening to Western trade, on states not directly colonized, such as the Ottoman Empire, Japan, China, Thailand, Egypt, and Iran.” Kennedy, *supra* note 54, at 640.

192. *See* Mattei, *supra* note 2, at 436–40. Note that imperialism, in Mattei’s view, “is not limited to a relationship between ‘developed’ and ‘developing,’ or between a colonizing nation-state and colonized people . . . .” *Id.* at 401. It imposes modes of thought world wide. It “does not necessarily need to be a conscious effort.” *Id.* at 402.

193. *Id.* at 435.

194. *Id.* at 408–09.

consciousness.<sup>195</sup> It is beyond the scope of this article to establish or even to opine as to whether Mattei's cultural designation is accurate.<sup>196</sup> Such a determination would at least have to engage the question of whether Mattei is conflating a distributive, political issue with the cultural question.

Mattei contends that imperial law furthers Americanized reactive institutions that regard economic and market forces as prior to law.<sup>197</sup> The courts in a common law system are an example of what Mattei calls a reactive institution—an institution that reacts to market actors to police the limits of legal behavior. The opposite of a reactive institution would be an institution that views itself as constituting and governing market actors such that it could force them to internalize negative externalities of market activity.

Among U.S. laws that embody the notion that “the market governs the law rather than the other way around,”<sup>198</sup> the Uniform Commercial Code stands out as exemplary. Mattei observes that

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195. *Id.* at 411.

196. Many scholars have written—with varying conclusions and approaches—about the influence of the U.S. legal system abroad. Some believe that foreign legal systems are becoming “Americanized” in the sense that their legal systems are evolving to mimic in crucial ways the U.S. system. *See, e.g.,* R. Daniel Keleman & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT’L ECON. L. 269 (2002); Mattei, *supra* note 2 (espousing a theory of Americanized imperial law); Paul von Nessen, *The Americanization of Australian Corporate Law*, 26 SYRACUSE J. INT’L L. & COM. 239 (1999); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 246–48 (1991). Others acknowledge the tremendous influence of the American legal system but deny that this influence is leading to a transformation of foreign systems into highly Americanized systems. *See, e.g.,* Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 321–23 (2003); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1 (2004); Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL’Y INT’L BUS. 391 (1993). Regardless of the extent to which U.S. law is actually self-replicating abroad, as Máximo Langer writes: “Since the end of the Second World War, and particularly following the end of the Cold War, the American legal system arguably has become the most influential legal system in the world.” Langer, *supra*, at 1. The popularity of U.S. legal training (most notably in LLM programs) evidences this influence.

197. Mattei, *supra* note 2, at 429.

198. *Id.*

conceived “as a professional project of merchants,”<sup>199</sup> the UCC has “very little in common with the ‘core’ political project of a civilian code.”<sup>200</sup> The political project of a civilian code, Mattei implies, seeks to shape society in terms of substantive visions of justice.<sup>201</sup> The UCC, in contrast, seeks to codify dominant practices of some aggregate of merchants who each act in self-interest in the world of the marketplace.<sup>202</sup>

Some might criticize Mattei for expressing European resentment regarding the triumph of American over European imperial models. However, Mattei champions a strong, substantive civil code project out of belief that such a project could better curb unchecked, exploitative capitalistic behavior than the current trend towards common law-inspired deference to market actors. He writes:

There is a pattern of development based on leaving the social costs where they fall . . . . Reactive institutions . . . are simply incapable of handling the tremendous pressure that any attempt to internalize such externalities produces . . . . Imperial law is an institutional setting that does not compel market actors to internalize their social costs.<sup>203</sup>

A mighty, proactive institution capable of creating and enforcing externality controls would be required to create an efficient institutional setting for development.

The United Nations Convention on the Assignment of Receivables in International Trade<sup>204</sup> is an example of what Mattei calls imperial law. This Convention is designed to encourage

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199. *Id.*

200. *Id.*

201. See generally Ugo Mattei, *Hard Code Now!*, 2 GLOBAL JURIST FRONTIERS 1 (2002). Mattei’s focus is primarily on codification in Europe. The extent to which a civil law project undertaken to oppose Americanization in the former colonies could be described as a kind of imperial project raises a different question.

202. This view of commercial law is neither new, nor specific to the United States. Bruce Markell notes that “the history of commercial law is in part the history of pushing public courts to accept private norms . . . . Lord Mansfield, when sitting in equity, would convene an advisory jury of merchants knowledgeable in the subject of the case.” Markell, *supra* note 136, at 502.

203. Mattei, *supra* note 2, at 433.

204. United Nations Convention on the Assignment of Receivables in International Trade, G.A. Res., 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 (Dec. 12, 2001). At the moment, the Convention has not yet received acceptance by enough countries to give it force. See *United Nations Group Drafting Secured Transactions Guide*, NOVEDADES, June 2006.

secured lending collateralized by receivables and securitization of receivables. The laws of many foreign jurisdictions contain a variety of features that impede the kinds of receivables financings—such as securitizations—that are so voluminous in the United States. For example, many jurisdictions do not permit assignment of receivables in bulk,<sup>205</sup> assignment of receivables not yet in existence,<sup>206</sup> or of receivables containing anti-assignment clauses.<sup>207</sup> Also, these jurisdictions often require notice to the account debtor when the account is assigned. UNCITRAL's Convention on Assignment of Receivables overrides these local law provisions in nations that adopt it,<sup>208</sup> creating a layer of rules that apply to international assignments of receivables<sup>209</sup> that are similar to the rules enacted in the United States. The result in jurisdictions that adopt this Convention is a dualism in which local law exists as parochial and obsolete alongside the rules of the Convention, which scholars and reformers cast in contrast as efficient tools for facilitating access to credit.

The aesthetics of commercial law facilitate imperial dualism. Some of the rules that the Convention is designed to override may in fact be obsolete or of little value. However, others may provide protections to third parties (like account debtors) that the local legal culture deems important. Assessment of the potential value of the local law's approach is very difficult to undertake given the prevalence of (1) the energy aesthetic, casting this type of

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205. Meaning, an assignment of all of debtor's receivables as a pool, as opposed to separate assignment of each individual receivable.

206. In contrast, UCC Article 9 permits security interests in after-acquired collateral. U.C.C. § 9-204 (2001).

207. In contrast, UCC Article 9 states that an anti-assignment clause will not prevent creation, attachment, or perfection of a security interest in a contractual right to payment. *Id.* at § 9-408.

208. As mentioned above, this Convention has not been widely adopted. *See* sources cited *supra* note 204 and accompanying text. It is discussed here as an example of an international law project that draws on legal concepts popular in the United States and that fosters a sense of imperial dualism.

209. United Nations Convention on the Assignment of Receivables in International Trade, *supra* note 204, at art. 1(a). International assignments of receivables, according to the Convention, are those in which the assignor of the receivable and the assignee are in different states. *Id.* at art. 3. The Convention also applies to assignments of international receivables, which are receivables in which the assignor and the account debtor are in different states. *Id.* Once the Convention applies to a receivable, it continues to apply even if future assignments find the assignor and assignee in the same jurisdiction. *Id.* at art. 1(b).

convention as a forward-moving reflection of market necessities, (2) the grid aesthetic, limiting the concerns addressed in the Convention to the facilitation of access to as much credit as possible, leaving questions about desirable levels of debt and development goals to other groups, and (3) the instrumentalist aesthetic, enabling legal actors to treat the Convention as a tool of high utility, detached from ideological commitments.

## 2. *Resisting Imperial Dualism*

This critique of aesthetics of commercial law is a form of resistance to imperial dualism as presented by Mattei. International legal actors who are aware of the suppressed, pre-reflective preferences of U.S. commercial law can think critically about whether U.S. models comport with their own priorities and preferences. Exploring aesthetics of the UCC can provide such actors with a vantage point and vocabulary to resist the idea that U.S. commercial law merely facilitates a universal impulse towards increasing commercial activity.

If imperial law is perpetuated by images of local law as formalistic, parochial, and obsolete, the energy aesthetic perpetuates imperial law by casting the UCC as a progressive, forward-moving model. The energy aesthetic, again, presents the law as evolving in response to the evolving needs of market actors. To question this image of U.S. commercial law as a continuing, progressive response to the needs of commercial actors is to resist the capacity of this image to perpetuate imperial dualism.

The energy aesthetic pervades international commercial law reform efforts. Frequent characterizations of U.S. commercial law as “modern” evidence the prevalence of this aesthetic. The UCC itself states that its purpose is, among other things, to “modernize the law governing commercial transactions.”<sup>210</sup> “Modernization” projects in law, generally, are designed to make the law compatible with new or evolving economic, social, political, or technological conditions.<sup>211</sup>

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210. U.C.C. § 1-103(a) (2006).

211. See Geva, *supra* note 54, at 1036–44 (discussing modernizing, harmonizing, and unifying law reform projects). The idea of modernizing law reform projects has roots in modernization theories of development. These approaches to development, most popular in the 1950s and 1960s, contend that a society’s lack of development is a result of and is reflected in its adherence to traditional (and not modern) cultural, political, and economic structures. See Davis & Trebilcock, *supra* note 177, at 12. Though modernization theory is not as popular today as it was in the last century, the idea persists that a failure to be

References to “modern” (meaning U.S.-style) commercial laws abound in literature on international rule of law efforts.<sup>212</sup> The category “modern” becomes a stand-in for desirability. The notion that U.S. commercial law is desirable because it is forward-moving, is modern, implies that other systems of commercial law that exist in the developing world are not modern—are antiquated or obsolete. Yet, what U.S.-style commercial law seems designed for is the postmodern logic of late capitalism.<sup>213</sup>

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“modern,” or to adhere to traditional social and institutional structures, impedes development in certain regions.

212. Bruce Markell makes reference to “modern” commercial laws as he reports that many countries are asked to adopt Western-style commercial law as a condition of receiving aid from the IMF and the World Bank. *See* Markell, *supra* note 136, at 501. *See also* Geva, *supra* note 54, at 1035 n.4 (noting that “UCC Article 9 is the standard model for modern Canadian personal property security statutes”); Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT’L L.J. 443, 452–53 n.28 (1997) (noting that IMF conditions are not published; they become known through reports in media, from governments, and from commercial banks). Similarly, in a report opposing a proposed amendment to the Bankruptcy Code designed to provide recourse for unsecured creditors, a group of prominent commercial law scholars argues that the amendment “would effectively repeal . . . much of [UCC] Article 9, thus relegating secured transactions law in the United States to the *genre* of legal regimes that exist in many developing countries, with corresponding impediments to financing and capital formation.” William M. Burke et al., Report on Avoidance, Subordination, Super Priority, and Recharacterization Provisions of the Proposed Employee Abuse Prevention Act of 2002 (Sept. 3, 2002), *reprinted in* Steven L. Harris & Charles W. Mooney, Jr., *The Unfortunate Life and Merciful Death of the Avoidance Powers Under Section 103 of the Durbin-Delahunt Bill: What Were They Thinking?*, 25 CARDOZO L. REV. 1829 app. at 1867 (2004). They continue that “this repeal would come not long after all 50 states . . . intended to modernize the statute to facilitate the capital formation that is so crucial to the health of our national economy.” *Id.* In these passages, “modern” indicates law that is updated to accommodate contemporary commercial practices. It reflects the energy aesthetic. Apparently, impediments to financing and capital formation indicate a failure to be modern, an immature or backwards state.

213. The concept of “late capitalism” stems from Marxists associated with The Frankfurt School. It suggests a final incarnation of capitalism before its inevitable demise. *See* Fredric Jameson, POSTMODERNISM OR THE CULTURAL LOGIC OF LATE CAPITALISM xviii (1991). Whether the Marxist theorists who originally coined the term are correct about the inevitability of an ultimate end to capitalism is not relevant here. Regardless of whether onset of late capitalism marks capitalism’s immanent demise, certain developments in modes of



The scholars cited here may not intend, in using the term “modern,” to assert either a philosophical position (modern and not postmodern) or the realization of an epoch (modernity and not postmodernity).<sup>214</sup> Yet, it is difficult to hear this term used to describe contemporary U.S. commercial law without considering both the energy aesthetic and the irony that social and political forces that seem specifically postmodern drive the success of U.S. commercial law.

The export of U.S. commercial law reflects efforts to bring a range of nations into a global marketplace in which investors seek amenable legal climates in which to access resources and finance projects. Fredric Jameson has written that “late capitalism began in the 1950s, after the wartime shortages of consumer goods and spare parts had been made up, and new products and new technologies (not least those of the media) could be pioneered.”<sup>215</sup> Jameson cites as exemplary of the postmodern condition of late capitalism: the formation of multinational and transnational business organizations,<sup>216</sup> the expansion of the “monopoly stage” of capitalism beyond any national border,<sup>217</sup> the internationalization of business,<sup>218</sup> new dynamics in international banking,<sup>219</sup> computers and automation,<sup>220</sup> and the planned obsolescence of goods.<sup>221</sup> To the extent that U.S. commercial law models facilitate, encourage, and create these activities, they can hardly be called “modern.”

This point is important because describing U.S. commercial law as “modern” functions to legitimate it, to make it desirable. If U.S. commercial law is modern, then other sets of commercial laws are pre-modern, are antiquated, are remnants of a past that should be discarded for the bright horizon of accelerated capital formation. It is difficult to understand and consider the merits of laws that legal

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production and the expansion of capitalism seem specific to postmodernity and to augment the postmodern condition. This section is concerned only with how the UCC encourages these modes of production and this expansion of capitalism such that it cannot be properly understood as “modern.”

214. For a concise, general discussion of modernism and postmodernism, see Dennis Patterson, *Postmodernism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 375 (Dennis Patterson ed., 1999).

215. Jameson, *supra* note 213, at xx.

216. *Id.* at xviii–xix.

217. *Id.*

218. *Id.* at xix.

219. *Id.*

220. *Id.*

221. *Id.* at 4–5.

scholars and the World Bank and IMF relegate to pre-modern stagnancy.

Imperial law as presented by Mattei is marked by a deference to market actors in the sense that these actors are not required to internalize negative externalities of commercial activity. The grid aesthetic in U.S. commercial law is a mode of excluding consideration of such externalities. The grid aesthetic that pervades U.S. commercial law encourages (1) increasing commercial lending, trading, securitizing, etc., coupled with (2) relegation of the clean-up to other legal regimes (that may or may not have adequate power or authority to remedy any particular clean-up that arises). A more holistic approach to commercial law that encourages responsibility for consequences of commercial activity could perhaps better reduce negative externalities.<sup>222</sup> Possibilities may exist in foreign jurisdictions to construct legal models that force market actors to internalize the costs of their transactions. Presenting disregard of negative externalities as part of a pre-reflective, aesthetic preference for certain divisions of responsibility within law challenges the notion that this disregard is a logical or rational feature of commercial law.

The observation that the image of commercial law as a tool has itself become a tool alerts people concerned with development to one way in which ideology-laden arguments can take an instrumentalist form. Of course, some commercial law concepts in foreign jurisdictions may in fact be obsolete. For example, Boris Kozolchyk points to a Spanish-colonial law notion in Mexico that real property is more valuable than personal property, which is "res vilis, or vile property."<sup>223</sup> This kind of idea about personal property may have no real contemporary value. Other concepts, however, may provide a framework for considering third party interests or curbing over-investment. Priority schemas that privilege wage or labor claims in bankruptcy may be of tremendous value.<sup>224</sup>

Aesthetics of commercial law discourage assessment of the possible advantages of other models.<sup>225</sup> It is difficult to consider the

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222. The best prospects for such an approach may lie in using contracts (specifically, loan covenants) as mechanisms for private lenders to shape the environment in which they invest over time in a responsible way.

223. Boris Kozolchyk, *The Basis for Proposed Legislation to Modernize Secured Financing in Mexico*, 5 U.S.-MEX. L.J. 43, 45 (1997).

224. See, e.g., *Meeting of OAS-CIDIP-VI Drafting Committee*, *supra* note 130, at 449-50.

225. This article assumes an intrinsic value to considering alternative models of commercial law in the context of economic development. Arguments for legal pluralism in and of itself raise a host of issues that are beyond the scope of this article to resolve. Legal pluralism has an emancipative potential to reject

value of alternative approaches to commercial law: (1) when the energy aesthetic subordinates law to a facilitative role vis-à-vis market actors; (2) when the grid aesthetic relegates consideration of response to externalities to other laws and groups; and (3) when the instrumentalist aesthetic implies that commercial law is a tool, detached from specific cultural or ideological commitments, to be used for a range of ends.

### CONCLUSION

R.H. Coase stated that “problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.”<sup>226</sup> Coase implies that aesthetics and morals are what are left after problems of welfare economics dissolve, eluding the types of quantitative approaches generally preferred by economists.

In the field of commercial law, certain aesthetics deter engagement with moral questions about what forms and volume of commercial transactions are good—about who is helped and who is harmed by different formulations of commercial law. It is crucial to recognize these questions given the contemporary volume and global nature of commercial activity.

This study of aesthetics is not something that follows a breakdown of quantitative approaches. Rather, it presents aesthetic elements of commercial law that affect the capacity to translate the results of analytical approaches (quantitative or otherwise) into law reform. It is a point of departure for understanding the nature and value of commercial law.

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structures of domination *if* autonomous ways of living are possible and good. So, to argue for legal pluralism as an end in itself, one must believe that something is wrong with the current trajectory of developments and that pluralism, if permitted to flourish, will yield alternatives that will be identifiable as valuable and good. Further, in discussions of pluralism, it is important to distinguish liberal legal pluralism—state attempts to integrate and accommodate alternative norms—from personal, interest politics or forum shopping.

226. R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 43 (1960).